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Docket No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

CLIFTON J. HUMPHRIES,

Petitioner,

V.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; CARGILL, INCORPORATED; AND COMMERCIAL UNION INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FOURTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals below committed error in deciding that petitioner, a Ship Foreman, claiming workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), did not meet the situs requirement of coverage for benefits under the Act, 33 U.S.C. § 903(a).

CERTIFICATE OF INTERESTED PERSONS AND PARTIES TO THE PROCEEDING BELOW

The undersigned counsel of record certifies that the following listed persons or parties have an interest in the outcome of the case and are parties of the proceeding below:

Clifton J. Humphries, the petitioner herein; his counsel, Sidney H. Kelsey, Jr., P.C.; Solicitor General, Department of Justice; the Director, Office of Workers' Compensation Programs, U.S. Department of Labor and its counsel, Joshua T. Gillelan, II, Esquire, Office of the Solicitor, U.S. Department of Labor; Cargill, Incorporated, the employer; and Commercial Union Insurance Company, the workers' compensation carrier and collectively, its attorney, Forest A. Nester, Esquire.

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1987

Clifton J. Humphries,

Petitioner,

v.

Director, Office of Workers Compensation Programs, United States Department of Labor; Cargill, Incorporated; and Commercial Union Insurance Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF THE APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, CLIFTON J. HUMPHRIES, prays that a Writ of Certiorari issue to review the August 28, 1987 judgment and decision of the United States Court of Appeals for the Fourth Circuit, a rehearing of which was denied by the Court below on October 30, 1987.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals, Slip Op. No. 87-2508, published (4th Cir. 1987), affirmed a decision of the Benefits Review Board, United States Department of Labor (hereinafter "BRB") and is referred hereto as Appendix B. The Court of Appeals entered an order denying petitioner's petition for rehearing and suggestion for rehearing in banc on October 30, 1987, and is referred hereto as Appendix A.

The Decision and Order of the BRB reversing the Administrative Law Judge (hereinafter "ALJ") is referred hereto as Appendix C. The Decision and Order of the ALJ finding jurisdiction is referred hereto as Appendix D.

JURISDICTION

The order of the Court of Appeals denying a petition for rehearing and suggestion for rehearing *in banc* was entered on October 30, 1987, denying the petition. This Petition for a Writ of Certiorari was filed within 90 days of that date, 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the appeals court below was invoked under 33 U.S.C. § 921(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 902. *Definitions*

When used in this chapter -

. . .

(3) the term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder,

and ship breaker, . . . *

33 U.S.C. §903. Coverage

(a) . . . compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel) . . . *

STATEMENT OF THE CASE

This is a claim for workers' compensation benefits arising under the Longshore and Harbor-Workers Compensation Act (LHWCA), as amended, 33 U.S.C. § 901 et seq., hereinafter

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* The LHWCA as amended in 1984, amended §2(3) and §3(a) of the Act but did not affect the language or definitions related to the issue of jurisdiction in this case.

referred to as "the Act". Claimant, Clifton J. Humphries, was an employee at Cargill, Inc., Chesapeake, Virginia who held the position of Ship Foreman when he was injured on December 23, 1974, resulting in qualriplegia. Claimant Humphries filed for benefits under the Act and a formal hearing was held before the ALJ in Hampton, Virginia on August 22, 1985 which afforded all parties an opportunity to present testimonial and documentary evidence. On January 17, 1986, Frank J. Marcellino, the Administrative Law Judge, rendered a decision and order awarding claimant benefits under the Act and specifically held that claimant met the jurisdictional requirements under the Act as to both status and situs, 33 U.S.C. § 902(3) and 33 U.S.C.

§ 903(a) (App. D16-17)*. The employer, Cargill, appealed this decision and order to the BRB, and on December 15, 1986 the BRB reversed the ALJ's decision on jurisdiction and held that the situs requirement was not met and held that the claim was outside of the jurisidiction of the Act (App. C-16). The petitioner, Clifton J. Humphries, appealed the decision of the BRB to the United States Court of Appeals for the Fourth Circuit, invoking its jurisdiction under 33 U.S.C. § 921(c). On August 28, 1987, the Court of Appeals affirmed the decision of the BRB and held that the employee was not injured on a maritime situs (App. B14-16). The petitioner, Humphries, then petitioned for a rehearing and suggestion

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* Refers to Appendix to this Petition.

for rehearing in banc to the United States Court of Appeals for the Fourth Circuit upon the grounds that the opinion and decision of the Court of Appeals contained several material facts which were overlooked in the decision which facts were the basis upon which the decision was made and which decision in part conflicted with its own decision in Newport News Shipbuilding & Drydock v. Graham, 573 F.2d 167 (4th Cir. 1978). The United States Court of Appeals for the Fourth Circuit denied the petition for rehearing and suggestion for rehearing in banc on October 30, 1987 (App. A1-2).

STATEMENT OF THE FACTS

Clifton J. Humphries, an employee at Cargill for some 17 years, held the position as a Ship Foreman who worked out of the Cargill plant at the waterfront located on the Elizabeth

River in Chesapeake, Virginia. At the time of his injuries, claimant was a Ship Foreman who was also acting as a Shift Foreman on the second shift (4 p.m. to 12 midnight) on the day and night of the accident. As Ship Foreman, Humphries was in charge of the entire operation of Cargill at the time and supervised all of Cargill's maritime employees. His duties involved ship inspections and assignments and duties on the vessels berthed at the Cargill plant. On the day and night of petitioner's injury, December 23, 1974, Humphries and the Cargill maritime employees were actually loading a vessel berthed at the Cargill facility. The custom and direct orders of the employer, Cargill, required the Ship Foreman, Humphries, to leave the waterfront to obtain a meal for its ship inspector

working overtime so that the ship inspector could continue his duties onboard ship without having to take a meal break and thus shutting down the loading operation (App. D-5, 9-11).

As per company orders, Humphries departed the loading area in his vehicle to obtain a meal for his ship inspector. He left the waterfront and the Cargill facility and made a right turn on Bainbridge Boulevard, traveling north to Veal's restaurant, which was located approximately one mile down Bainbridge Boulevard. Mr. Humphries went into Veal's restaurant, charged the meal for the grain inspector, the account of which was maintained by the employer Cargill, exited the restaurant and was struck by a third party automobile and was severely injured rendering him a qualriplegic. At the time of

petitioner's injury at Veal's, he was in charge of the entire grain-loading operation taking place at the plant by way of a walkie-talkie which he had on his person at the moment of injury. Humphries was not on a personal errand of any kind (App. D3-5, 9-11).

Veal's restaurant lay on the **west** side of Bainbridge Boulevard where all maritime facilities including Amoco, the Texaco Terminal and other maritime terminals existed. All were contiguous to each other and located on the Southern Branch of Elizabeth River. The restaurant was also located directly between and connecting two facilities of Cargill on Bainbridge Boulevard: the main waterfront plant out of which Humphries worked, and the Elizabeth River Terminal facilities where Cargill loaded peanuts, etc. On the west side

of Bainbridge Boulevard where Veal's restaurant lay, there existed maritime and industrial businesses utilizing the port operations in the vicinity west of Bainbridge Boulevard. Physically the restaurant was located only two-tenths of a mile to the waterfront or four hundred yards when measured by a straight line. The only egress and ingress by land to the Cargill facility as well as other maritime terminals was Bainbridge Boulevard. All land transportation serving not only Cargill but the other waterfront facilities utilized only Bainbridge Boulevard or rail. On the east side of Bainbridge Boulevard there did exist some residential area. By automobile, it only took a few minutes, round trip, to drive from the Cargill plant at the waterfront where petitioner worked

to Veal's restaurant and back. Veal's restaurant was also the only restaurant utilized by Cargill when it ordered its ship foreman to obtain a meal for its ship inspector working overtime. There were no meal facilities available at the Cargill plant and thus the necessary trip from the plant area to obtain this meal at a nearby restaurant which Humphries utilized within the range of his radio in order to continuously supervise the grain-loading operation (App. D11-16).

REASONS FOR GRANTING CERTIORARI

In affirming the judgment of the BRB denying the petitioner compensation pursuant to the LHWCA, the court of appeals has decided a question of federal law in conflict with past decisions of this Court and other courts of appeals. As aptly noted by the

appeals court below, this case "created new and intractable jurisdictional problems for maritime workers." (App. B-7). A decision by the Court in this case would bring about a much needed uniformity among the federal circuits in determinations as to where coverage under the LHWCA ends and coverage under an applicable state worker's compensation law begins.

Since this Court's decision in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) (hereinafter Caputo), it has been clear that, pursuant to the 1972 Amendments to the LHWCA, an employee can recover compensation under the Act only if the employee is "engaged in maritime employment," 33 U.S.C. §902(3) (1970 ed., Supp. V) and if the employee was injured upon the "navigable waters of the United States,"

33 U.S.C. §903(a), which is defined in the Act to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." By the 1972 Amendments, Congress extended coverage to additional workers injured in accidents occurring in areas landward from the waters's edge while narrowing the coverage to apply only to those workers in such areas that are actually engaged in maritime employment.

This Court in Caputo emphasized that Congress desired a system of compensation which would provide compensation to longshoremen and other maritime workers which would not depend upon whether the worker happened to be on land or over water at the time

of his injury-producing accident. 432 U.S. at 250. It held that an expansive view of the coverage extended by the 1972 Amendments should be taken, as the Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." Id. at 268 (quoting Voris v. Eikel, 346 U.S. 328, 333 (1953)).

One of the claimants in Caputo was a member of a regular stevedoring gang. On the day of Caputo's injury, he went to the waterfront hiring hall where he was hired as a terminal laborer. Noting that his assignment could have been changed at any time, the Court observed that Caputo would clearly have been covered had he been unloading a vessel rather than loading a consignee's truck at the time of the

accident. The Court held that "to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate." 432 U.S. at 274. The Caputo court observed:

> We need not decide, however, whether the congressional desire for uniformity . . . entitles everyone performing a task such as Caputo's to benefits under the Act. It is clear, at a mininum, that when someone like Caputo performs such a task, he is to be covered. The Act focuses primarily on occupations--longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they

> spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity.

432 U.S. at 272-73 (emphasis added).

Although the Caputo decision deemphasized the importance of the situs requirement in a case in which the claimant's status as a longshoreman was clear, it did not set forth any guidelines as to the extent to which an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" may be expanded landward away from the water's edge to incorporate activities of maritime employees which occur away from their vessel. Since Caputo, Supreme Court decisions on this subject have merely reiterated the principles regarding "situs" as set forth in Caputo

and have focused instead on whether the claimants in those cases were engaged in maritime employment at the time of their injuries. See P.S. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985) (holding that a fixed offshore oil rig is physically analogous to a pier or wharf and clearly a covered situs).

The circuit courts of appeal have reached inconsistent conclusions as to the precise boundaries of the "navigable waters of the United States" situs requirement under Section 3(a) of the LHWCA. In Sea-Land Services, Inc. v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976), the Third Circuit held that as long as the employment relationship with the maritime activities is maintained, the federal compensation

remedy is available regardless of the situs of the accident producing the injury. The Sea-land court found that the limits of federal coverage are not determined by a geographic relationship with the navigable waters of the United States, but by the location of the interface between the air, land and water modes of transportation. Id. at 638. Under this test, an employee engaged in maritime activity may be covered by the LHWCA even if his accident occurs "at some point remote from the pier." Id. see also Dravo Corp. v. Maxin, 545 F.2d 374 (3d Cir.) cert. denied, 435 U.S. 908 (1976) (where majority of work performed in structured steel shop was related to shipbuilding or ship repair, ship was "adjoining area" within Section 903(a) of the LHWCA even though shop was located

some 2,000 feet from navigable channel and separated from most of the shipbuilding facilities by city street).

In the Fifth Circuit, the Court of Appeals, while not eliminating entirely the situs requirement where the LHWCA's requirement was met, held that a situs may qualify as an "adjoining area" as long as it is "close to or in the vicinity of navigable waters, or in a neighboring area." Texports Stevedore Co. v. Winchester, 632 F.2d 504, 514 (5th Cir. 1980). The Winchester court found that an adjoining area's perimeter is defined by function and that such area need not be used exclusively for maritime purposes "so long as it is customarily used for significant maritime activity." Id. at 515. In Winchester, a gear room for repairing tools used by stevedores

in loading ships five blocks from the waterfront was found to be "not clearly outside the waterfront area customarily used by employers for gear rooms." Id. The Winchester court partially overruled an earlier decision in that circuit, Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1970) where the court focused only on the clerical activities of the office in which the injury occurred without examining the maritime nature of the overall area where the office was located. In Winchester, the court also rejected the position that the presence or absence of nonmaritime buildings between the point of injury and the water is an absolute test for whether an injury is covered under the LHWCA.

The Ninth Circuit Court of Appeals in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978) established a four-part test for determining whether or not a site is an "adjoining area" under 33 U.S.C. §903(a). The relevant factors include: (1) the particular suitability of the site for maritime uses; (2) whether the adjoining properties are devoted primarily to uses in maritime commerce; (3) the proximity of the site to the waterway; and (4) whether the site is as close to the waterway as is feasible, given all the circumstances.

Applying this test, the court in Motoviloff v. Director, Office of Worker's Compensation Programs, 692 F.2d 87 (9th Cir. 1982) held that a facility operated by a terminal company for refurbishing metal containers for

shipped cargo was not a "situs" within the meaning of the LHWCA because the refurbishment did not require a site particularly suited to maritime uses and the actual choice of the site was governed by factors of cost and transportation rather than its marine proximity. More recently, however, in Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982), the Ninth Circuit ruled that an accident occurring approximately 1,700 feet landward of the controlled access gate to the army base docks at which a longshoreman, who was injured in an automobile accident while driving his personal vehicle home, was working was an "adjoining area" under 33 U.S.C. §903(a). The Perkins court followed the Sea-Land holding that the employer-employee relationship rather

than the situs of that relationship is significant for purposes of admiralty jurisdiction. Id. at 1101.

Although the First and Fourth Circuits have also considered this issue, neither has developed a test for determining whether a particular place of work meets the LHWCA's "situs" requirement. In Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264 (1st Cir. 1976), the court, in finding that Congress intended for "adjoining areas" to include not only areas as directly adjoining the berth of the specific vessel being unloaded but also places which are generally part of the same waterfront area, noted that "[t]he evil of the old Act was that it bifurcated coverage for essentially the same employment." Id. at 275. In the Fourth Circuit, the

Court in Newport News Shipbuilding & Drydock v. Graham, 573 F.2d 167 (4th Cir. 1978) held that a submarine shop and foundry was included in the "navigable waters of the United States" for purposes of the LHWCA since both were "integral parts of the shipyard" even though they are located 1,200 feet and 3,000 feet respectively from the water's edge and even though neither was devoted exclusively to ship-related work.

The decisions of the BRB in Alford v. MP Industries of Florida, 16 Ben. Rev. Bd. Serv. (M-B) 261 (1984) arising out the Fifth Circuit, illustrates the difficulties posed by the lack of a uniform standard for determining whether the LHWCA's situs requirement has been met in a given case. The claimant, employed to rig scaffolding

and move equipment inside a ship's tanks to facilitate the sandblasting and repainting of the tanks located at the Jackonville shipyard, was injured in an automobile accident on his way back to the shipyard from downtown Jacksonville, where he was sent by the employer to pick up equipment needed for the sandblasting and repainting. Although the employer frequently sent employees to pick up supplies downtown and the route was, therefore, an area customarily used by the employer in pursuit of its ship repair business, the Board found that the route was not converted into an "adjoining area." The Board concluded that "[a]lthough the area covered by Section 3(a) has broad limits, we cannot extend the concept of an 'adjoining area' to include the route through a downtown area of

a city to and from an independent wholesaler." Id. at 263. Although the claimant cited Caputo in contending that Congress intended to alleviate the problem of employees walking in and out of coverage under the LHWCA, the Board found that acceptance of the claimant's argument would, in effect, read the situs requirement out of the Act.

Although expansion of the navigable waters to include portions of a city's downtown may indeed be more liberally construing the term "adjoining" than Congress intended, it illustrates the difficulty in determining exactly how far from the water's edge a longshoreman may venture before he steps out of federal coverage and into state worker's compensation coverage. While the Third Circuit's decision in Sea-Land has

been criticized for reading the situs requirement out of the Act entirely, the Caputo decision comes close to doing the same in situations where an employee's status as a maritime worker is clearly shown. The uncertainty created as the result of varying tests for determining if the "situs" requirement has been met and the varying emphasis placed upon the requirement by decisions of the Supreme Court and the Circuit Courts of Appeal warrants a review of this issue by the Court in the instant case to determine exactly what the outermost boundaries of "navigable waters of the United States" may be. It is imperative that a more definite standard be set forth to ensure uniformity in workers' compensation coverage sought for maritime workers in various parts of the country under

the LHWCA.

The decisions of the Fourth Circuit Court of Appeals in the petitioner's case appear to be in direct conflict with the decision of this Court in Caputo and the decision of several other Circuit Courts. Claimant Humphries indisputably enjoys the status of a longshoreman in his usual occupation as a Ship Foreman for Cargill. He has worked for 17½ years for the respondent in a number of stevedoring capacities. At the time of his accident, the petitioner was also acting as a Shift Foreman in another's absence. Although it has been held that an employee need not be engaged in maritime activity at the precise moment of his injury, P.C. Pfeiffer Co. v. Ford, supra, 444 U.S. at 83 n.18; Stockman v. John T. Clark & Son of Boston,

Inc., supra, 539 F.2d at 274, claimant Humphries had been performing the duties of a Shift Foreman on the vessel berthed at the Cargill facility throughout the day of his accident and was clearly still performing those duties when he was injured. In accordance with company policy, custom and orders, Humphries was obtaining a meal on behalf of his employer for a grain inspector working on the vessel when another vehicle collided with his parked vehicle. He was equipped at the time with a radio within range to continue supervising the loading of the vessel and to keep in constant contact with the personnel involved in this operation. The restaurant at which his vehicle was parked at the time of the accident is located only three-tenths or two-tenths of a mile from the waterfront

and squarely within the same maritime industrial area on the **west** side of Bainbridge Boulevard where the various terminal facilities are contiguous to each other. The restaurant was customarily utilized by Cargill in securing meals for its employees working overtime and an active charge account was maintained there for this purpose.

The Caputo court emphasized that the 1972 Amendments were intended to provide continuous coverage for maritime workers although they may, from time to time, step out the usual territorial bounds of the federal Act's coverage. Since, in the instant case, as in Caputo, there is not question as to the status of Humphries as a longshoreman or that he was engaged in activity directly related to this status, coverage should be afforded him under the LHWCA

regardless of whether Veal's restaurant would ordinarily qualify as an "adjoining area."

The appeals court in this case below, while acknowledging that there is "no single convincing test for determining just where the geographical boundaries of coverage under the LHWCA lie," (App. B-9), offered no test for petitioner and other maritime workers to follow except "a difficult exercise in line drawing." (App. B-10). Moreover, its past decisions offered no comprehensive test for such a determination on "situs" (App. B11-12).

The Winchester court found that an adjoining area need not be used exclusively for maritime purposes and that the nature of activities in the overall area rather than in the precise place where the injury occurred should

be examined in determining if that place satisfies the situs requirement of 33 U.S.C. §903(a).

Finally, the court of appeals decision was based on patent mistakes of fact in evidence: Veal's restaurant **was** along Bainbridge Boulevard which **did** connect two facilities of Cargill and **did** traverse continuous and contiguous terminal areas on the **west** side, and the restaurant was **not** separated from the nearest maritime terminal by a residential neighborhood (which was **east** of the Boulevard) (App. B14-15). This was the grounds upon which the petition for rehearing was requested but denied (App. A1-2).

While Veal's restaurant itself may not be used primarily for maritime purposes and adjacent areas may also be used for other purposes, clearly

the overall area surrounding its location is one principally devoted to maritime activity and any liberal construction of the situs requirement should lead to a conclusion that the restaurant is an "adjoining area" of the nation's navigable waters for purposes of the LHWCA.

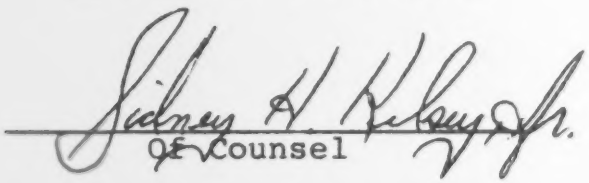
CONCLUSION

For the foregoing reasons, it is apparent that the Fourth Circuit Court of Appeals' decision in this case conflicts with the Supreme Court's decision in Caputo as well as with decisions of other circuit courts of appeal which have exercised liberality in construing the situs requirement of the LHWCA in cases in which the employee's status as a maritime worker were clear. A definitive decision in this case at this time would ensure

uniformity in the application of the LHWCA in the various circuits, thereby limiting future ligitation on the issue. Accordingly, the petitioner requests this Court to grant his Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

CLIFTON J. HUMPHRIES

BY: 
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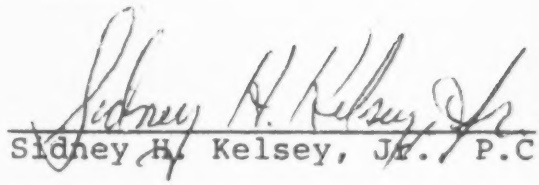
CERTIFICATE OF SERVICE

I certify that on the 28th day of January, 1988, forty (40) copies of the foregoing Petition for Writ of Certiorari were transmitted to the Clerk, Supreme Court of the United States and three (3) copies thereof were mailed to each of the following: Solicitor General, Department of Juctice, Washington, D.C. 20530; Mr. Lawrence W. Rogers, Director, Office of Workers' Compensation Programs, U.S. Department of Labor, Suite S-3524, NDOL, Washington, D.C. 20210; Joshua T. Gillelan, II, Esquire, Office of the Solicitor, U.S. Department of Labor, Suite N-2620, NDOL, Washington, D.C. 20210; Forest A. Nester, Esquire, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, 1111 19th Street, N.W., Washington, D.C. 20036, counsel for Cargill Inc., and Commercial

Union Insurance Company; and Clifton J. Humphries, 920 Kinglet Avenue, Chesapeake, Virginia 23324.



Sidney H. Kelsey, Jr., P.C.

87-1887

Docket No.

Supreme Court, U.S.
FILED
JAN 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1987

CLIFTON J. HUMPHRIES,

Petitioner,

V.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; CARGILL, INCORPORATED; AND COMMERCIAL UNION INSURANCE COMPANY,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

SIDNEY H. KELSEY, JR., P.C.
522 S. Independence Boulevard
Suite 104
Virginia Beach, Virginia 23452
(804) 497-2107

Counsel for Petitioner

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APPENDIX A

F I L E D
October 30, 1987

U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEAL

FOR THE FOURTH CIRCUIT

NO. 87-2508

Clifton J. Humphries,

Petitioner,

versus

Director, Office of Workers' Compensation Programs, etc., et al,

Respondents.

The petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the

petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Ervin and Judge Wilkinson.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX B

P U B L I S H E D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-2508

Clifton J. Humphries,

Petitioner,

versus

Director, Office of Workers Compensation Programs, United States Department of Labor; Cargill, Incorporated; Commercial Union Insurance Company,

Respondent.

On Petition for Review of an Order of the Benefits Review Board.

Argued July 1, 1987.
Decided August 28, 1987

Before PHILLIPS, ERVIN and WILKINSON, Circuit Judges.

Sidney Harison Kelsey, Jr. for Petitioner; Forest Anthony Nester (Seawell, Dalton, Hughes & Timms on brief) for Respondents.

CORRECTED OPINION/STATUS
CHANGE TO PUBLISHED

PHILLIPS, Circuit Judge:

This appeal challenges the Benefits Review Board's conclusion that a maritime employee's injury did not occur on a maritime situs, so that his injury cannot be compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq. The employee also raises various other issues pertaining to the decision by the Board. We conclude that the Board correctly decided that the injury did not fall within the jurisdiction of the Act, and thus affirm without addressing the other issues

raised.

I

On December 23, 1974, a car struck and seriously injured petitioner Clifton J. Humphries. At the time of the accident, Humphries, a ship foreman for respondent Cargill, Inc., was working in Chesapeake, Virginia, as a shift foreman on Cargill's second loading shift from 3:30 P.M. to midnight. As one of his job duties as shift foreman, Humphries was required to pick up food for employees working overtime. Cargill imposed this responsibility on the shift foreman as a matter of company policy and on its direct orders in order to prevent interruptions in loading and unloading operations on the later shifts. At approximately 10:00 P.M., Humphries

left the Cargill terminal to pick up a meal for one of the overtime workers at a restaurant approximately one and one-half miles from the loading operation. Humphries picked up the meal but, as he left the restaurant, experienced car trouble. When Humphries left his car to check under the hood, a passing motorist struck him. Humphries suffered severe spinal cord and head injuries.

When Humphries filed a claim for benefits under the LHWCA, Cargill responded with a petition for review and hearing before an Administrative Law Judge (ALJ). After a full evidentiary hearing, the ALJ decided in favor of Humphries on most of the contested issues after ruling that Humphries had fully established jurisdiction under the Act.

Cargill petitioned for review

by the Benefits Review Board, challenging the ALJ's decision on jurisdiction, as well as the relief awarded. Humphries cross-appealed on the ALJ's determination of his average weekly wage and the ALJ's disallowance of a portion of his attorney's fee request. The Board reversed the ALJ, concluding that Humphries' injury was not covered under the LHWCA because, at the time of his injury, he was not on a maritime situs. Humphries then petitioned for review of the Board's order and applied for enforcement of the ALJ's order.

II

Before 1972, LHWCA coverage was determined primarily by the traditional "locality" test of maritime tort jurisdiction. Under this test, the Act covered workers injured on

navigable waters, while those injured on adjoining land, pier, or wharf were afforded only state workmen's compensation coverage. A longshoreman moving cargo from ship to pier passed in and out of coverage as he worked.

In 1972, Congress amended the LHWCA to protect "amphibious workers" who moved back and forth from ship to land during their maritime activities. Two Amendments to the LHWCA accomplished this purpose. First, Congress extended the Act's coverage landward by including "any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. 33 U.S.C. § 903(a) (emphasis added). This so-called "situs requirement" not only expanded LHWCA coverage spatially but also created

potential coverage for many workers whose occupations had never before been covered. Congress therefore added a parallel "status requirement," limiting the landward coverage to those workers "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder, and ship-breaker." 33 U.S.C. § 902(3).

While in theory the conjunction of the "status" and "situs" requirements might seem to promise more uniform and predictable coverage, it created new and intractable jurisdictional problems of the sort we encounter in this appeal. In this case, the ALJ found that Humphries was engaged in "maritime employment" at the time of his accident, and thus met the status requirement. While Cargill implies

on appeal that procuring a meal for a longshoreman is not really "maritime employment," it never seriously contested Humphries' status before the ALJ or the BRB. In any event, Humphries' "status" does not depend on the specific task he was performing at the time of his injury, Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 140 (9th Cir. 1978), and as a shift foreman supervising and facilitating a loading operation Humphries was clearly "engaged in maritime employment."

The difficult question is whether Humphries can also meet the Act's "situs requirement," i.e., whether he was injured in an "adjoining area customarily used by an employer in loading . . . a vessel." It is generally settled that a covered situs need not be used exclusively for maritime purposes or be within any specified distance

of navigable waters or a "maritime" operation. Perkins v. Marine Terminals Corp., 673 F.2d 1097, 1101-1102 (9th Cir. 1982). There is, however, no single convincing test for determining just where the geographical boundaries of coverage under the LHWCA lie.

The Third Circuit, in a case heavily relied on by Humphries, attempted to solve the problem by folding the situs requirement into the status requirement, concluding that so long as the worker is engaged in maritime employment his physical location at the time of his injury is irrelevant. Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629, 636-39 (3d Cir. 1976). This approach to the jurisdictional problem created by the Act offers the advantage of preventing the "checkered coverage" created by an arbitrary geographical test. It

also, however, effectively reads the explicit situs requirement out of the Act. The Supreme Court has rejected such "simplifications" of the LHWCA, observing that both the status and situs requirements of the Act must be met independently, and that any resulting "curious hole" in coverage is simply a product of Congress's statutory scheme. See Herb's Welding, Inc, v. Gray, 470 U.S. 414, 426-27 (1985) (noting, inter alia, that "there will always be a boundary to coverage, and there will always be people who cross it during their employment."). See also Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

While the Sea-Land approach is unacceptable, an alternative requires a difficult exercise in line drawing. The Fifth Circuit, in an opinion which struggled bravely with the issue, ended

up with little more than a litany of factors which are not conclusive in a situs determination - absolute contiguity with navigable waters, fence lines, local designations of the area, exclusive use for maritime purposes, and so on. See Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980). The Ninth Circuit, in what at first glance at least seems a more practical approach, proposed four factors for a situs determination: (1) the particular suitability of the site for maritime purposes; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) proximity to the waterway; and (4) whether the adjoining site is as close to the waterway as feasible. Brady-Hamilton, 568 F.2d at 141. The Fourth Circuit has addressed the situs issue, but without purporting to offer

a comprehensive test. See Newport News Shipbuilding and Dry Dock Co. v. Graham, 573 F.2d 167, 169 (4th Cir. 1978) (finding jurisdiction when the situs of a worker's injury was an "integral part [ ] of the shipyard" despite the distance of the situs from the waterway).

The ALJ made a number of findings of fact on which he premised his jurisdictional conclusions. His conclusion on the situs issue itself, while inbued with "factual" qualities, is essentially a mixed question of law and fact which we, like the Board, can review for errors of law. See Levins v. Benefits Review Board, 724 F.2d 4, 6 (1st Cir. 1984) (reviewing an ALJ's determination of maritime "status," and noting "that neither this court nor the Board owes special deference to the ALJ with respect to

determinations of statutory policy, even though these may be 'fact sensitive'"). We agree with the Board that the ALJ erroneously concluded that Humphries met the situs requirement on the facts of this case.

While the ALJ cited Sea-Land to support his conclusion, he at least ostensibly based his decision, as the Act requires, on the character of the area in which the accident occurred rather than Humphries' status at the time of the accident. He observed that the restaurant was located in an area "customarily," though not "primarily," used for significant maritime activities, along a public highway on which various maritime employers maintained terminal facilities. The restaurant itself was several hundred yards from the Elizabeth River. Citing Texports as authority, the ALJ noted

that "[s]o long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the Act." See Texports, 632 F.2d at 514.

Without venturing to offer a touchstone for all future LHWCA jurisdictional questions, we conclude that these findings by the ALJ do not demonstrate that Humphries was injured on a maritime situs. Humphries' accident occurred well over a mile from the Cargill terminal, along a public highway which did not connect any portions of Cargill's operations or traverse continuous or contiguous terminal areas. The restaurant itself, while arguably located in a "waterfront area," was separated from the Elizabeth River and the nearest maritime terminal by a residential neighborhood. Cargill's workers did not patronize the restaurant

because of its proximity to the Elizabeth River and at least one other restaurant was nearer to the Cargill facility. The restaurant was not, as in Graham, an "integral part" of the Cargill terminal.

We feel that this combination of circumstances militates against any description of the accident scene as a maritime situs. As the Board aptly noted, the location of Humphries' activities at the time of his injury was "fortuitous," and did not result from "hazards uniquely inherent in the shipyard industry." The LHWCA requires us to draw a spacial line for coverage under the Act. We agree with Humphries that a broad interpretation of the maritime situs requirement is warranted on statutory and policy grounds. See Texports, 632 F.2d at 516. Were we to read the

situs requirement so broadly as to embrace this claim, however, we would come perilously close to eliminating it entirely.

AFFIRMED.

APPENDIX C

P U B L I S H E D
FILED AS PART
OF THE RECORD

DEC 15 1986
(date)

LINDA M. MEEKINS/sdb
Clerk of the Board
Benefits Review Board

DECISION and ORDER
En Banc

U.S. DEPARTMENT OF LABOR

Benefits Review Board
1111 20th Street., N.W.
Washington, D C 20036

BRB Nos. 86-636
and 86-636-A

CLIFTON J. HUMPHRIES	)
	)
Claimant-Respondent	)
Cross-Petitioner	)
	)
v.	)
	)
CARGILL, INCORPORATED	)
	)
and	)
	)
COMMERCIAL UNION INSURANCE COMPANY	)
	)
Employer/Carrier-	)
Petitioners	)
Cross-Respondents	)

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of Frank J. Marcellino, Administrative Law Judge, United States Department of Labor.

Sidney H. Kelsey, Jr., Virginia Beach, Virginia, for claimant.

Forest A. Nester (Seawell, Dalton, Hughes & Timms), Norfolk, Virginia, for employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, and SMITH, BROWN, DOLDER and MCGRANERY, Administrative Appeals Judges.

Ramsey, Chief Administrative Appeals Judge:

Employer appeals and claimant cross-appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees (85-LHCA-933) of Administrative Law Judge Frank J. Marcellino awarding benefits pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm those determinations of the administrative law judge which are rational, supported by substantial

evidence, and consistent with applicable law. 33 U.S.C. §921(b)(3); O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

At the time of his injury, claimant was employed as a ship foreman at employer's grain loading facility in Chesapeake, Virginia. He was in charge of loading and inspecting grain, and was responsible for relieving shift foremen when necessary. As part of his job, claimant or another supervisor was required to obtain meals for certain employees working overtime. This meal service was provided on an irregular basis, but it was employer's policy that a supervisor would obtain the meals to avoid disrupting the work process. As employer did not have an on-site meal facility, meals were obtained from one of several restaurants in the Chesapeake area.

On December 23, 1974, during the course of his employment, claimant left employer's dockside facility and drove his own car approximately one and one-half miles to Veal's Restaurant to obtain a meal for a grain inspector. Claimant parked his car in front of the restaurant on Bainbridge Boulevard, a major north-south artery in the waterfront area of Chesapeake. Although claimant was not required to patronize Veal's Restaurant, Cargill employees preferred its food over that of other closer restaurants, and employer maintained a charge account there for employee's use. After obtaining the meal, but before leaving the front of the restaurant, claimant experienced car problems and checked under the hood. While inspecting his car, claimant's car was struck by another vehicle and driven approximately fifty

feet up an embankment. Claimant was pinned between a telephone pole and a street sign while partially under his car. As a result of the serious spinal and head injuries he sustained, claimant is permanently and totally disabled and confined to a wheelchair. This claim for benefits ensued.

The threshold question before the administrative law judge was whether the claim came within the jurisdictional provisions of the Act. The administrative law judge correctly determined that for jurisdiction to exist, claimant must be engaged in maritime employment (status) and must be injured at a maritime situs. 33 U.S.C. §§902(3), 903(a); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). The administrative law judge further determined that claimant was engaged

in maritime employment at the time of injury. That determination is not challenged on appeal.

The main focus of this appeal is the administrative law judge's holding that claimant was injured on a maritime situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). [1] In so holding, the administrative law judge concluded that the site of the accident had a sufficiently close nexus with maritime activity to be considered an "adjoining area" pursuant to Section 3(a). The

---

[1] Section 3(a) of the Act provides that:

> Compensation shall be payable under this Act. . . only if the disability or death results from an injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.

33 U.S.C. §903(a) (emphasis supplied).

administrative law judge based this finding on the proximity of claimant's injury to the waterfront (3/10 to 4/10 mile) and to employer's grain loading facility (approximately 1½ miles). The administrative law judge also found that the general area in which the injury occurred is customarily used for significant maritime activities. Concluding that a maritime situs finding in this case is consistent with the remedial purpose of the Act and avoids having employees walk in and out of coverage during the course of their employment, the administrative law judge found jurisdictional requirements met.

On appeal, employer challenges the administrative law judge's conclusion that claimant was injured on a maritime situs. Specifically, employer argues that claimant was not injured at any

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of the areas enumerated in Section 3(a), and that the administrative law judge's determination that the area surrounding Veal's Restaurant is an adjoining area pursuant to the Act is not in accordance with law.

For the reasons expressed herein, we agree with employer's contentions, and reverse the administrative law judge's conclusion that claimant was injured on a maritime situs as defined in the Act.

In reaching his conclusion, the administrative law judge relied on cases extending the Act's jurisdiction to general areas used customarily for a significant maritime purposes. See Texports Stevedores Co. v. Winchester, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980); Sawyer v. Tideland Welding Service, 16 BRBS 344 (1981). Finding that the Act's coverage is not foreclosed

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when an injury occurs on a public road, see Sealand Services v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976), the administrative law judge extended the Act's jurisdiction by finding that the general area surrounding Veal's Restaurant is customarily used for significant maritime purposes.

Both Winchester, supra, and Sawyer, supra, involved claimants who were injured in the course of their maritime employment in areas not immediately adjacent to the waterfront. In Winchester, the United States Court of Appeals for the Fifth Circuit extended coverage to a gear room not directly adjoining the waterfront, but which was part of employer's overall loading process. 632 F.2d at 516, 12 BRBS at 728. In Sawyer, the Board found that a public highway served a maritime purpose and was therefore a covered

situs because it was the sole access between two of employer's maritime facilities. 16 BRBS at 346.

The cases relied upon by the administrative law judge are distinguishable from the case before us, and are therefore not controlling. An "adjoining area" is qualified by the Act as an area "customarily used by an employer in loading, unloading, repairing, or buiding a vessel." 33 U.S.C. §903(a). The injuries in both Winchester and Sawyer occurred at a locus used for one of the specified maritime purposes. The injury in the instant case occurred at a non-maritime locus, in front of a restaurant on a public highway which was located in an area where both general maritime and non-maritime activities were occurring. Unlike Winchester and Sawyer, the place of injury in the instant

case does not meet the statutory definition.[2]

We also hold that the administrative law judge's conclusion is inconsistent with the test for "adjoining area" developed by the United States Court of Appeals for the Ninth Circuit in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). In Herron, the court discussed the 1972 amendments to the Longshore Act and the effect of the new Section 3(a), by which Congress extended coverage to land-based activities. Citing the Supreme Court's decision in Caputo,

---

[2]Furthermore, we are not persuaded by the administrative law judge's reliance on Sealand Services, supra, a decision in which the situs requirement of the Act was virtually eliminated. In a subsequent decision, the Supreme Court clearly indicated that an employee must have both status and situs to be covered under the Act. See Caputo, supra.

supra, the court noted that Congress adopted the 1972 amendments in order to accomplish two purposes: first, to recognize that modern cargo handling techniques have moved much of a longshoreman's work onto land; and second, to provide continuous coverage to workers who otherwise were covered for only part of their activities. Applying this rationale, the court in Herron, supra, determined that in order to further the goal of uniform coverage, the phrase "adjoining area" in Section 3(a) should be read to describe a functional relationship that does not in all cases depend on physical contiguity with navigable waters. The court stated that in determining whether a site is an "adjoining area", consideration should be given to the following factors:

1. The particular suitability

of the site for the maritime uses referred to in the statute.

2. Whether adjoining properties are devoted primarily to uses in maritime commerce.

3. The proximity of the site to the waterway.

4. Whether the site is as close to the waterway as is feasible given all of the circumstances.

Herron, supra, 568 F.2d at 141, 7 BRBS at 411. See also Palma v. California Cartage Co., 18 BRBS 119 (1985); Bennett v. Matson Terminals, Inc., 14 BRBS 526 (1981).

Analysis under this test recognizes that the location of a particular activity may be fortuitous and not based on maritime concerns. Here Veal's Restaurant is a public restaurant whose purpose involves food service rather than any maritime activity. It is located in an industrial area with much of the surrounding property devoted to maritime commerce. However, the area is not primarily used for or particularly suited to maritime commerce,

as evidenced by the existence of other non-maritime activities in close proximity. The record indicates that a shopping center, high school, and other non-maritime businesses are in the same area as the restaurant, and that a residential neighborhood is between the restaurant and the river.

We find this approach to be inconsistent with a recent Board decision involving similar facts. In Alford v. M.P. Industries of Florida, 16 BRBS 261 (1984), the Board declined to extend the Act's jurisdiction to a claimant injured in an automobile accident while on a maritime employment-related errand in downtown Jacksonville, Florida. In Alford, the Board noted that the maritime situs requirement specifically limits the Act's coverage, and that a public route through a downtown area of a city is not an adjoining area

pursuant to Section 3(a). 16 BRBS at 263. Furthermore, in Newport News Shipbuilding and Drydock Co. v. Graham, 573 F.2d 167, 8 BRBS 241 (4th Cir.), cert. denied, 439 U.S. 979 (1978), the United States Court of Appeals for the Fourth Circuit recognized that the situs requirement is met when a particular location is an integral part of a shipyard or customarily used by an employer in repairing or building a vessel. This holding is consistent with our conclusion that claimant's injury did not occur at a covered situs because the restaurant is not integral to the maritime activity specified in the Act.

At the time of his injury, claimant was not exposed to the hazards uniquely inherent in the shipyard industry. Instead, claimant was injured on a public street in front of a restaurant

in an area where maritime industry co-exists with other non-maritime activities including businesses and residential neighborhoods. As this area is not primarily used for or particularly suited to maritime commerce, and because the location of the restaurant is fortuitous and not based on maritime concerns, we must reverse the administrative law judge's situs determination, and hold that the claim is outside the jurisdiction of the Act. We therefore need not consider the remaining arguments on appeal or those raised in the cross-appeal.

Accordingly, the Decision and Order Awarding Benefits is reversed.[3]

---

[3] By order dated March 31, 1986, the Board granted a stay of accrued benefits in this appeal and set the case for expedited review. As we have reversed the award, the stay is no longer necessary and is hereby dissolved.

SO ORDERED.

s/ROBERT L. RAMSEY
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

We Concur:

s/ROY P SMITH
ROY P. SMITH
Administrative Appeals Judge

s/JAMES F. BROWN
JAMES F. BROWN
Administrative Appeals Judge

s/NANCY S. DOLDER
NANCY S. DOLDER
Administrative Appeals Judge

s/REGINA C. MCGRANERY
REGINA C. MCGRANERY
Administrative Appeals Judge

Dated this 15th day
of December 1986

APPENDIX D

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 85-LHC-933

OWCP No. 5-48974

In the Matter of	:
	:
CLIFTON J. HUMPHRIES,	:
Claimant	:
	:
v.	:
	:
CARGILL, INC.,	:
Employer	:
	:
and	:
	:
COMMERCIAL UNION INSURANCE COMPANY,	:
Carrier	:
	:
and	:
	:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	:
Party-in-Interest	:

Sidney H. Kelsey, Jr., P.C., Esquire
3408 Boyd Road
Virginia Beach, VA 23452
For the Claimant

Forest A. Nester, Esquire
Seawell, Dalton, Hughes & Timms
900 Wainwright Building

Bute and Duke Streets
Norfolk, Virginia 23510
For the Employer

Before: FRANK J. MARCELLINO
Administrative Law Judge

DECISION AND ORDER

This is a claim for workers' compensation benefits arising under the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C. §901 et seq., hereinafter referred to as the Act. A formal hearing was held in Hampton, Virginia on August 22, 1985 at which all parties were afforded an opportunity to present testiminial and documentary evidence.

Stipulations

On the record at the hearing the parties stipulated to the following matters which I find to be established:

1. The date of the accident and injury is December 23, 1974.

2. Employer was advised of and learned of the accident on December 23, 1974.

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3. An employer employee relationship existed at the time of the accident.

4. The claim was filed on April 6, 1984.

5. The notice of controversion was filed on April 30, 1984.

6. Claimant has received benefits from the Commonwealth of Virginia.

7. Employer has paid medical benefits to cover the cost of equipment

Statement of Facts

Claimant, a 59-year-old man, has worked for Employer for more than seventeen years. He began work in 1957 and became a lead man assisting the foreman. Eventually, he became a scale man loading ships and checking the scales. Finally he became a ship foreman, responsible for loading grain, inspecting grain, and relieving the shift foreman when necessary.

On December 23, 1974 Claimant, a ship foreman, was substituting as a shift foreman on the second shift from 3:30 p.m. to midnight. He assumed

COPY

full responsibility for the plant and for supervision of its employees. As one of his job duties, Claimant was required to secure meals for certain employees working overtime (Tr. at 82, 222). At approximately 10:00 p.m., he left the plant to pick up a meal for Sam Warren, a grain inspector who was working overtime. He drove his own car to Veal's Restaurant, approximately 1½ miles away (Tr. at 228, 255), where Employer currently maintained its only charge account for meals. (Tr. at 95, 225-226). He charged the meal and procured a receipt. When he left the restaurant, he experienced car problems and decided to check under the hood of his car. While he was inspecting his car, another driver hit the tail of his car into Claimant's car and knocked it fifty feet up an embankment. Claimant was

pinned between a sign post and a phone pole partially under his car.

As a result of this accident, Claimant sustained severe spinal cord and head injuries, rendering him quadriplegic. He was hospitalized from December 23, 1974 to December 19, 1975. During this time he underwent several major surgical procedures and received five months rehabilitation at Woodrow Wilson Rehabilitation Center. Before his release from the hospital, he and his wife were taught catheter care, irrigation, and other procedures required to maintain the basic activities of his daily living. Claimant has lost completely his senses of taste, touch, and smell, and has lost partially his sense of hearing. His bowel and bladder functions are totally impaired resulting in incontinence. Claimant has been diagnosed as being permanently

and totally disabled. (See Claimant's Exhibit Number 6). Claimant's condition has worsened progressively, and he has experienced kidney infections, breathing problems, swollen ankles, and bowel accidents. He constantly must deal with pain, spasms, incontinence, indigestion, inactivity and dependence. He requires skilled nursing care and attendance at all times which his wife has been providing since he was released from the hospital.

Notice of the Claim

Claimant's injury occurred on December 23, 1974. Employer filed a report of accident with the Industrial Commssion of Virginia on December 24, 1974 (Employer's Exhibit Number 4); however, it did not file a report of accident with the United States Department of Labor at that time. Claimant filed his Notice of Claim

on April 6, 1984, almost 10 years after his injury. (Claimant's Exhibit Number 2). Employer filed its Notice of Controversion on April 30, 1984 contesting, among other things, the timeliness of both notice and filing of the claim. (Claimant's Exhibit Number 2; Employer's Exhibit Number 3).

Section 13(a) of the Act provides that the right to compensation for disability is barred unless the claim is filed within one year after the injury. Section 30(f) of the Act provides, however, that where the employer or carrier has been given notice or has knowledge of the injury and fails, neglects, or refuses to file a report as required by Section 30(a), the one-year limitation period of Section 13(a) shall not begin to run until such report is filed with

the Secretary of Labor.

In this case, Employer acquired knowledge of the accident on the date it occurred, but failed to file a report with the Labor Department until September 24, 1984. (Claimant's Exhibit Number 2). Although Employer filed a report with a state agency, this filing did not satisfy the reporting requirement of Section 30(a) of the Act. See Director, Office of Workers' Compensation Programs v. National Van Lines, Inc., 613 F.2d 972, 984 (D.C. Cir. 1979). I find, therefore, that Claimant's notice and filing of his claim were timely because Employer's failure to file an accident report with the Labor Department prevented the one-year limitation period from running.

Jurisdiction

To come within the jurisdiction of the Act, Claimant must qualify under

both the status and situs tests. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). In order to satisfy the status requirement and become eligible for compensation, Claimant must qualify as a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations..." 33 U.S.C. §902(3) (Supp. V 1975).

Employer is in the business of receiving and storing grain and other products at its facilities on the Elizabeth River. Claimant's duties, while acting as a shift foreman, involved supervising the loading and unloading of cargo moored at Employer's facility, as well as supervising employees. His duties involved some inspections on the vessels themselves, as well as a variety of land-based activities.

Claimant testified that while

acting as a shift foreman on the second shift, he was required by Employer to secure meals for men who worked overtime. (Tr. at 60-61). Securing meals was a company policy and a direct order by Employer, rather than a courtesy or favor. (Tr. at 222-223). This policy served to ensure that the loading and unloading operations would continue without interruption. Because Employer had no facilities on its premises to provide meals to its employees, Claimant was required to leave Employer's premises to secure the meal. The fact that Claimant was securing a meal at the time of this injury is of no real consequence, because satisfaction of the status requirement does not depend upon the task the employee was performing at the moment of the injury. See Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978).

Claimant's presence at the site of his injury was related directly to fulfilling the duties and responsibilities of his job. At the time and place of his injury, Claimant maintained supervision over and responsibility for the loading activities of Employer's maritime workers. In addition, he carried a radio and was available at all time for communications regarding the longshore activities on Employer's premises. I find, therefore, that Claimant's duties and responsibilities, as well as his actual work activities, clearly establish his status as a longshoreman under the Act.

In order to satisfy the situs requirement, Claimant's injury must have occurred upon the navigable waters of the United States, which are defined in the Act to include any "adjoining

area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. §903(a) (Supp V 1975). Claimant was injured on Bainbridge Boulevard in front of Veal's Restaurant. (See Claimant's Exhibit Number 1; Employer's Exhibit Number 1). Although Bainbridge Boulevard is a public road, coverage under the Act is not foreclosed by the fact that the accident occurred on a public road. Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3rd Cir. 1976). The Act requires only that the general area in which the accident occurred be used customarily for significant maritime activities. Sawyer v. Tideland Welding Service, 16 BRBS 344 (1984). So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the Act. Texports

Stevedore Co. v. Winchester, 632 F.2d 504, 514 (5th Cir. 1980).

Claimant contends that Veal's Restaurant was in an area primarily and customarily used by all modes of transportation for loading and unloading cargo, serving all waterfront docking facilities, including Employer's. (Claimant's Exhibit Number 5, p. 4, para. 25). Employer, on the other hand, contends that Veal's Restaurant was in an area "customarily, but not primarily," devoted to transportation related to Employer's operation. (Employer's Exhibit Number 6, p. 3, para. 35). The Act, however, does not require that the area be used primarily for maritime activities as long as it is customarily used for significant maritime activities. See Sawyer, 16 BRBS 344.

Veal's Restaurant was located

in the same general industrial area on the side of Bainbridge Boulevard on which the Cargill, Texaco, Amoco, and Elizabeth River Terminal facilities abut the Elizabeth River. (Tr. at 65-68, 71, 75, 82, 99-100, 102-104, 221, 228). Claimant testified that these surrounding businesses were maritime in nature and required the services of longshore workers. (Tr. at 67). Mr. Henry T. Thrasher, a real estate appraiser, testified that the area in which Veal's was located was basically an industrial area associated with maritime activities and the waterfront. (Tr. at 205-206). He noted that two creeks, which branch directly off the Elizabeth River on which Employer's facilities lies, run all the way up to Bainbridge Boulevard. (Tr. at 210-211). This fact was corroborated by Mr. Charles Ryan, a

Cargill employee. (Tr. at 263). Mr. Ryan also testified, however, that Veal's was located in a residential area containing only light industry. (Tr. at 257).

After reviewing the maps submitted by both parties (Claimant's Exhibit Number 1; Employer's Exhibit Numbers 1 and 2) and after carefully considering the testimony given at the hearing, I find that the situs of the accident has a sufficiently close nexus with maritime activity to be considered an "adjoining area" under Section 3(a) of the Act. I base this finding on the fact that Claimant was injured only 3/10 to 4/10 of a mile from the waterfront (Tr. at 255) and approximately 1½ miles from Employer's facility. (Tr. at 228, 255). In addition, the evidence shows that the general area in which the accident occurred was

customarily used for significant maritime activities. This conclusion is also in keeping with the purpose of the Act. First, the Act must be construed liberally in favor of coverage to effectuate its broad remedial purpose. Perkins v. Marine Terminals Corp., 673 F.2d 1097, 1104 (9th Cir. 1982); Winchester, 632 F.2d at 515. Second, a broad interpretation of the maritime situs requirement reduces the number of workers walking in and out of coverage and promotes uniformity. See Winchester, 632 F.2d at 516.

In sum, at the time of his injury, Claimant was acting within the scope of employment as a longshoreman and was located in an area adjoining the Elizabeth River, where significant maritime activities customarily took place. I find, therefore, that Claimant has satisfied both the status and situs

requirements and that this case comes properly within the jurisdiction of the Act.

Average Weekly Wage

Under Section 8(a) of the Act, Claimant is entitled to permanent total disability benefits amounting to 66 2/3 percent of his average weekly wage at the time of the accident. The Claimant contends that his average weekly wage was approximately $423.00 based on a salary of $21,993.00 in 1974. Employer, on the other hand, contends that his average weekly wage was $267.65 based on a salary of $13,918.16 in 1974.

Claimant testified that he began 1974 earning $725.00 per month. In April, his salary was increased to $1,000.00 per month and remained the same through the time of his accident. The only other change in his earnings

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during 1974 was that in October or November he became entitled only to compensatory time, rather than overtime. (Tr. at 109). Claimant also testified that he received a bonus of approximately $1,200.00 in 1974.

The record contains two of Claimant's W-2 statements showing wages of $13,918.16 in 1974 and $8,075.00 in 1975. (Claimant's Exhibit Number 3; Employer's Exhibit Number 5). Claimant contends that the wages were earned entirely in 1974, but partially paid in 1975. Employer contends that the W-2 statements accurately reflect Claimant's wages for each year.

The testimony at the hearing was conflicting on whether Claimant's W-2 statements accurately reflected his earnings for each year. Claimant contends that because he did not work a day in 1975, all his wages were earned

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in 1974. On his Claim for Compensation (LS-203), however, Claimant noted at paragraph 31 that Employer paid him for six months of accrued sick leave after the injury. (Claimant's Exhibit Number 2). I find, therefore, that the earnings on the 1975 W-2 statement represent payments for Claimant's accrued sick leave and that they accurately reflect Claimant's income in 1975. I also find that Claimant's 1974 W-2 statement accurately reflects his income in 1974.

Based on Claimant's testimony, his W-2 statments, and his Claim for Compensation, I find that Claimant's earnings in 1974 were $13,918.16. Based on these earnings, I find that Claimant's average weekly wage at the time of the accident was $267.65. Claimant, therefore, is entitled to permanent total disability benefits

amounting to 66 2/3 percent of $267.65.

Medical Bills Incurred During 1985

Claimant has requested reimbursement for medical bills incurred as a result of two pass-out episodes in March and June of 1985. He submitted bills to Employer for emergency room care, a chest x-ray, and ambulance service, amounting to $295.00, but the carrier refused to pay them. (Claimant's Exhibit Number 4).

Claimant testified that he had two bowel accidents in which he passed out and was required to enter the hospital (Tr. at 78-79) He testified that Employer had paid for similar bills in the past and contends that Employer should be responsible for the payment of these bills as well. (Tr. at 79) At the hearing, Employer offered no evidence disputing liability for payment and did not cross-examine

Claimant on the issue.

Section 7(a) of the Act provides in part that Employer shall furnish medical treatment and hospital service "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a) Because I find Claimant's pass-out episodes directly related to his total disability and the treatment necessary for his care, I find Employer is liable under Section 7(a) of the Act for payment of these medical bills.

Scope and Value of Nursing Services

Claimant seeks compensation for the nursing and attendant services rendered by his wife since the accident. Employer does not contest the right of Claimant's wife to receive compensation for her services but has put into issue the scope and value of Claimant's wife's services.

Claimant's wife has provided complete care to Claimant since the day he returned home from the hospital. Claimant testified that his wife performs his bowel maintenance program three times a week and assists him with bathing, dressing, skin care, and personal hygiene. (Tr. at 88-89) He testified that when he has a bowel accident his wife is required to change him and wash his clothes and the bedclothes. (Tr. at 89) He also testified that because he has lost his sense of feeling, his wife is required to take safety precautions for him by warning him of extreme temperatures. (Tr. at 89) He testified that he depends on his wife's services 24 hours a day, seven days a week.

Claimant's wife testified that she cares for Claimant almost 24 hours a day. (Tr. at 237) She testified

that Claimant's condition has declined progressively and that he has experienced respiratory and kidney problems recently. (Tr. at 233) She noted that Claimant's health has worsened substantially since Crawford Rehabilitation Services prepared its cost analysis estimation in 1984 and that caring for Claimant has become more difficult. (Tr. at 234-235). In addition to performing his bowel maintenance program, Claimant's wife takes care of his catheter and does an extraordinary amount of laundry and cleaning due to Claimant's condition. (Tr. at 238-239). She testified that her own health is declining and that she has undergone surgery twice in the past 5 years. (Tr. at 236). Dr. Spyros Philippakis, her treating physician, noted that due to Mrs. Humphries' cholecystitis and extensive arthritis of the spine, she should

avoid any heavy lifting and strain. (Claimant's Exhibit Number 6). Although she would like some assistance in caring for Claimant, she testified that she does not want someone in the house at all times.(Tr. at 240-241).

The record contains a cost analysis estimation of nursing services prepared on March 22, 1984 by Patsy E. Britt, a medical services consultant at Crawford Rehabilitation Services. (Claimant's Exhibit Number 7). The report states that the services of an RN (registered nurse) or an LPN (licensed practical nurse) are rarely needed for individuals with spinal cord injuries and that a nurse attendant could perform most of the required services. Mr. Britt noted, however, that an in-home nurse attendant is difficult to procure on the market due to the stringent licensing requirements. The report concluded that Claimant requires health care

services performed by an attendant at an in-patient health care facility or by an RN or LPN at home. The report noted that Claimant's wife is performing the services of a well-trained experienced nurse attendant.

In her report, Ms. Britt recommended the following nursing services for Claimant based on a wage survey for the Tidewater area without adjusting for inflation:

Recommendation 1 (with wife's services):1/

nurse attendant 4 hrs. a day/3 days a wk. $6.00/hr. $72 wk.

LPN 4 hrs. a day/3 days a wk. $9.50/hr. $114 wk.

Recommendation 2 (without wife's services):

LPN 4 hrs. a day/3 days a wk. $9.50/hr. $114 wk.
and
Companion 156 hrs. a wk. $3.35 hr. $522.60 wk.

1/ It is unclear from the report whether Recommendation 1 requires the services of both a nurse attendant and an LPN, or whether either one alone would suffice. At any rate, Recommendation 1 seems to correspond with the minimum amount of respite care Claimant's wife should have.

Recommendation 2 indicates that in the absence of his wife's services, Claimant would require care 24 hours a day, 7 days a week.

Paula Huffman, a rehabilitation counselor for Crawford Rehabilitation Services, testified that she accompanied Ms. Britt when they visited Claimant to evaluate his needs in 1984. (Tr. at 164). She noted that Crawford Rehabilitation Services specializes in consultation and referral, and does not actually provide health care services. She explained that she had requested to update the report because of Claimant's changed condition but was not granted leave to do so. (Tr. at 181-182). Ms. Huffman gave no specific testimony concerning the particular health care required by Claimant nor the cost to provide such care.

Toni Tarr, a registered rehabilitation nurse who works for

Commonwealth Health Care, testified that Claimant's condition had worsened since Ms. Britt's 1984 report and that Claimant requires more care than is indicated in that report. (Tr. at 119-120). She testified that Claimant's wife provides skilled care at the professional nursing level of an LPN or RN. (Tr. at 121-122, 136). She testified that although a nurse's aide could perform his bowel maintenance program only under a nurse's supervision in the hospital. (Tr. at 139-140). She also noted the difficulty in finding qualified individuals to perform in-home care. Finally she recommended that Claimant's wife be provided with respite care to enable her to get out of the house, to care for herself, and to do her own housework. (Tr. at 129-130).

Based on her evaluation of Claimant's condition, Ms. Tarr

recommended the following:

Minimum Care Necessary (10 hrs. per day):

LPN 4 hrs. a day/3 days a wk.

nurse's aide 6 hrs. a day/3 days a wk.

nurses's aide 10 hrs. a day/4 days a wk.

Ideal Care--Comparable to a Skilled Care Facility (16 hrs. per day):

LPN 4 hrs a day/7 days a wk.

nurse's aide 12 hrs. a day/7 days a wk.

Donald Dahlman, an administrator at Commonwealth Health Care, testified that Claimant requires the services of both a nurse's aide and an LPN or RN on a daily basis. (Tr. at 150). He also testified that Claimant's wife should be provided with respite care. (Tr. at 153). He explained that the wages contained in Mr. Britt's 1984 report are very minimum wages and are not realistic. (Tr. at 152). Mr. Dalhman reported the following pay rates based on the June 1985 pay scales

of Commonwealth Health Care (Tr. at 149, 159-160):

Occupation	Customer Charge (per hour)	Employee Wage (per hour)
nurse's aide	6.80	4.50
LPN	10.35	7.00
RN	12.70	9.20
companion aide	6.40	4.15
live-in companion	61.00 (per day)2/	45.00 (per day)

Mr. Dahlman concurred with Ms. Tarr's recommendation for the minimum and ideal care necessary for Claimant in his condition. Based on the pay rates he reported, he testified that Commonwealth Health Care would charge its customer $512.60 per week for the minimum care necessary (Tr. at 155) and $847.00 per week for the ideal care, which is comparable to that of a skilled care facility. (Tr. at

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2/ There is a discrepancy in the transcript which makes it unclear whether the daily charge is $61 (Tr. at 149) or $51 (Tr. at 160).

156-157). He noted, however, that if Claimant's wife was not available to provide care, Claimant would require an additional 8 hours per day of companion aide care in the event of an emergency. Such care would increase the weekly charge by $358.40. Upon converting the rates charged by Commonwealth Health Care to the rates paid to its individual care providers, the minimum care necessary would cost $345.00 per week ($4.50 x 58 hrs. of nurse's aide services plus $7.00 x 12 hrs. of LPN services), and the ideal care would cost $574.00 ($4.50 x 84 hrs. of nurse's aide services plus $7.00 x 28 of LPN services).

Based on the record and the testimony given at the hearing, I find that Claimant's wife is entitled to compensation for the nursing services she provides to her husband. Although

Ms. Britt and Ms. Tarr testified that a nurse's attendant could perform most of the required services, they noted that some of the services could be performed by a nurse's aide only under a qualified nurse's supervision. They also emphasized the scarcity of qualified in-home health care. In addition, Mr. Dalhman testified that a qualified nurse would be required to handle any emergencies or accidents that Claimant might have.

Both Ms. Britt and Ms. Tarr testified that Claimant's wife performs skilled care for her husband. Ms. Tarr, who has been a nurse for 13 years, testified that Claimant's wife provides professional care at the level of an RN or LPN. I find, therefore, that Claimant should be compensated at the level of an LPN for at least some part of her services.

Mr. Dalhman testified that Commonwealth Health Care pays its LPNs $7.00 per hour and its nurse's aides $4.50 per hour. Based on his credible testimony, I find these rates are consistent with the prevailing community charges for similar services and are appropriate rates at which to compensate Claimant's wife for her services. Accordingly, I find Claimant's wife is entitled to compensation at an hourly rate of $7.00 for 4 hours a day, 7 days a week, for her time expended on Claimant's bowel maintenance program, his bowel accidents, and other emergencies. I also find that Claimant's wife is entitled to compensation at an hourly rate of $4.50 for 12 hours a day, 7 days a week, for her time expended on other nursing services and attendant care. Thus, her total compensation amounts to $574.00 per

week. This plan corresponds with Ms. Tarr's recommendation that Claimant receive 4 hours of LPN care and 12 hours of nurse's aide care each day. This plan also is comparable to the amount of care that Claimant would receive in a skilled health care facility.

Section 8(f)

Employer asserts that Section 8(f) applies, thus limiting its liability for compensation payments to 104 weeks. 33 U.S.C. 908(f). Section 8(f) requires that the claimant have a pre-existing permanent partial disability or disorder, manifest to the Employer, which combines with the subsequent injury to result in a greater permanent disability. See American Mutual Insurance Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). Included in the category of pre-existing permanent disabilities are: economic

category of pre-existing permanent disabilities are: economic disabilities under Section 8(c)(21), scheduled losses under Section 8(c)(1)-(20), and physical disabilities which would discourage employers from employing individuals because of an increased risk of accident or compensation liability. C&P Telephone Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977), rev'g Glover v. C&P Telephone Co., 4 BRBS 23 (1976); Johnson v. Brady-Hamilton Stevedore Co., 11 BRBS 427 (1979). Employer contends that Claimant's below-the-elbow arm amputation increased its risk of liability.

While working for Employer in 1957, Claimant suffered an employment-related injury requiring amputation of his left arm from below the elbow. (Tr. at 87-88). He was hospitalized for one week and returned

to work for Employer. (Tr. at 88). Although this injury qualifies as a scheduled loss under Section 8(c)(15) of the Act, the evidence shows that the injury was not disabling and that he was able to continue working until the time of his accident in 1974. Claimant continued to work for Employer for 17½ years holding various positions, performing his duties without difficulty, and receiving promotions over the years. (Tr. at 88). The evidence indicates that Claimant's injury was manifest to Employer; however, Employer presented no evidence to show an increased risk of liability to it as a result of the injury.

Employer submitted a report by Dr. Robert A. Rashti, who examined Claimant on August 21, 1985. Dr. Rashti found: "Despite Mr. Humphries loss of the left arm in 1957 he was not

disabled until subsequent injuries incurred from his spinal cord trauma which was sustained in December, 1974." He noted that the Claimant's neurological deficits, which are related directly to his 1974 accident, "in themselves render the patient disabled and are only compounded by the previous loss of his left hand." He also states that in his opinion, the 1974 accident had rendered Claimant permanently and totally disabled. (Employer's Exhibit Number 7).

Based on Dr. Rashti's report and Claimant's testimony, I find that Claimant's arm amputation did not contribute to his permanent total disability. I find that Claimant would have been rendered permanently and totally disabled as a result of his 1974 accident regardless of whether he had previously had his arm amputated.

Because Claimant's pre-existing condition did not contribute to his permanent total disability, which was caused solely by the 1974 accident, I find that Section 8(f) is inapplicable to the present claim.

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS ORDERED that:

1. Cargill, Incorporated pay to the Claimant compensation for permanent total disability at the rate of 66 2/3 per centum of claimant's average weekly wage of $267.65 from December 23, 1974, the date of the accident, and continuing. Credit will be given to Employer for prior voluntary compensation payments.

2. Cargill, Incorporated pay to the Claimant $295.00 to cover the cost of medical bills incurred as a

result of Claimant's pass-out episodes in March and June of 1985.

3. Cargill, Incorporated pay to the Claimant's wife compensation for nursing and attendant services she provides for Claimant at the weekly rate of $574.00 from the day Claimant returned from the hospital and continuing.

4. Interest shall be paid on accrued benefits from the date each installment was due until paid. Prior to October 1, 1982, the interest shall be six percent per annum. For payments due after October 1, 1982, the interest rate shall be the rate in effect on the date this Decision and Order is filed by the Deputy Commissioner pursuant to Grant v. Portland Stevedoring Co., 17 BRBS 20 (1985).

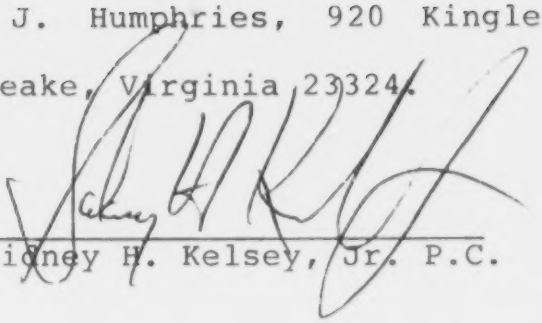
s/FRANK J. MARCELLINO
FRANK J. MARCELLINO
Administrative Law Judge

Dated 17 JAN 1986
Washington, D.C.
FJM:TC:kat

CERTIFICATE OF SERVICE

I certify that on the 28th day of January, 1988, forty (40) copies of the foregoing Appendices to Petition for Writ of Certiorari were transmitted to the Clerk, Supreme Court of the United States and three (3) copies thereof were mailed to each of the following: Solicitor General, Department of Juctice, Washington, D.C. 20530; Mr. Lawrence W. Rogers, Director, Office of Workers' Compensation Programs, U.S. Department of Labor, Suite S-3524, NDOL, Washington, D.C. 20210; Joshua T. Gillelan, II, Esquire, Office of the Solicitor, U.S. Department of Labor, Suite N-2620, NDOL, Washington, D.C. 20210; Forest A. Nester, Esquire, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, 1111 19th Street, N.W., Washington, D.C. 20036, counsel for Cargill Inc.,

and Clifton J. Humphries, 920 Kinglet Avenue, Chespeake, Virginia 23324.



Sidney H. Kelsey, Jr. P.C.

MOTION FILED
FEB 27 1988

No. 87-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLIFTON J. HUMPHRIES,

Petitioner,

—v.—

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; CARGILL, INCORPORATED; and COMMERCIAL UNION INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO IN SUPPORT OF THE PETITIONER

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MOTION OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36.3 of the Rules of this Court, the International Longshoremen's Association, AFL-CIO ("ILA") respectfully moves for leave to file the accompanying brief as amicus curiae urging the Court to grant a writ of certiorari to the Fourth Circuit Court of Appeals. In support of this motion, the ILA shows as follows:

1. This motion is necessitated by the refusal of Cargill Incorporated and Commercial Union Insurance Company to consent to the filing of a brief amicus curiae by the ILA.

2. The ILA is an unincorporated association and labor organization within the purview of the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.*, representing employees in an industry affecting commerce as defined in this Act. Its members include close to 100,000 workers in longshore and other cargo-handling trades and crafts from Maine to Texas, on the Great Lakes and in Puerto Rico. *See, e.g., Matter of New York Shipping Association*, 116 N.L.R.B. 1183 (1966).

3. The ILA has a compelling interest in the application of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), as amended, 33 U.S.C. § 901 *et seq.*, which is its members' primary source of compensation for job related injuries. The ILA has filed briefs amicus curiae in other cases before this Court involving interpretation of the LHWCA, *P.C. Pfeiffer Company, Inc. v. Ford*, 444 U.S. 69 (1979); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249 (1977); *Nacirema Operating Co., Inc. v. Johnson*, 396 U.S. 212 (1969). The petitioner in this case, Clifton J. Humphries, is a member of the ILA.

4. This case presents the issue of the lack of uniformity in the standard for determining whether the situs requirement of the LHWCA has been met in a given case. 33 U.S.C. § 903(a). Since the ILA represents longshore and harbor workers in 36 ports from Maine to Texas, it has an interest both in a liberal interpretation of the Act and in the establishment of a uniform policy among the federal circuits for determining where coverage under the LHWCA ends and coverage under an applicable state workers' compensation law begins.

5. The ILA has requested the consent of all parties below to its filing an amicus brief in support of the petition. All except the attorney for Cargill Incorporated and Commercial Union Insurance Company have consented.

Amicus respectfully submits that this case involves an important question of federal law deserving of this Court's attention. The ILA prays that the Court grant its motion to appear as an amicus and to accept the attached brief intended to assist the court in reaching its determination on the petition.

Dated: New York, New York
February 26, 1988

Respectfully submitted,

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Counsel for International Longshoremen's Association, AFL-CIO

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DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; CARGILL, INCORPORATED; and COMMERCIAL UNION INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

INTEREST OF THE AMICUS CURIAE

A statement describing the interest of the International Longshoremen's Association, AFL-CIO ("ILA") in this case is set forth in the foregoing motion for leave to file this brief.

STATEMENT OF THE CASE

Petitioner seeks review of a decision by the Court of Appeals for the Fourth Circuit that denied him benefits under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), as amended, 33 U.S.C. § 901 *et seq.* Amicus ILA adopts the statement of facts set forth in the petition, which do not seem to be disputed and may be summarized as follows.

Petitioner had been employed by Respondent Cargill, Inc. ("Cargill") for more than seventeen years until an accident rendering him a paraplegic ended his career. His injury occurred while petitioner was working as a ship foreman for Cargill. Pursuant to the orders of his employer, petitioner drove from Cargill's facility to a restaurant approximately one mile from the marine terminal to pick-up a meal for the ship inspector. Cargill maintained a charge account at the restaurant, and it was part of petitioner's regular duties as ship foreman to go there and bring back a meal whenever a ship inspector worked overtime so that the loading operation would not be interrupted by a meal break. Petitioner suffered his injury outside the restaurant.

The Administrative Law Judge awarded benefits under the LHWCA, Petitioner's Appendix, D-1, holding that petitioner met the situs requirement of the Act in that the restaurant was an "adjoining area" to navigable waters of the United States, which the LHWCA defines to include:

> [A]ny adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.

33 U.S.C. § 903(a).

The Benefits Review Board ("BRB") reversed. Petitioner's Appendix, C-1. In the decision for which review is sought, the Fourth Circuit upheld the Board, holding that petitioner was not injured on a maritime situs. Petitioner's Appendix, B-1.

REASONS FOR GRANTING THE WRIT

1. The Scope of the Situs Requirement of This Important National Law Should be Decided by the Supreme Court.

The LHWCA is an important piece of national legislation covering maritime workers on all the navigable waters of the United States and their adjoining areas. The Act is not merely regulatory but creates a sizable bureaucracy to process and pass upon claims. The public purse as well as the public weal is implicated.

The efforts of labor and management to improve the safety of longshore operations happily have resulted in a reduction in the number of compensation claims brought under the LHWCA in recent years. Notwithstanding, the number of injuries and claims remain substantial: 152,073 in 1984, 107,063 in 1985, and 63,063 in 1986. Employment Standards Administration, Annual Statistical Report: January 1985 at p. 1; February 1986 at p. 1; March 1987 at p. 1. Moreover, despite the fewer claims, the level of compensation and medical benefits has remained consistently high: $369,049,000 in 1983; $351,147,000 in 1984; and $340,430,000 in 1985. Employment Standards Administration, Annual Report on Administration of the Act During Fiscal Year 1986: Table A-1.

The scope of the Act and its resulting cost in benefits is the result of Congressional design. This Court has repeatedly recognized that the Act "must be liberally construed in conformance with its purpose." *Voris v. Eikel*, 346 U.S. 328, 333 (1953) and that "an expansive view of the extended coverage" of the 1972 amendments should be taken. *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 268 (1977).

Historically, the work of longshoremen has been and remains the virtually all-encompassing handling of ocean-going cargo between the inland carrier and the vessel itself. In a less mobile technology, this work once occurred relatively close to the ship. With increasing technological flexibility, the modern ocean ter-

minal has radically expanded in size and complexity, moving ever landward. In addition, necessary and routine functions involved in the loading and unloading of ocean cargo can be carried on at significant distances from the water's edge. There is no longer any need that the marine compound be a single, contiguous geographical unit.

Congress' recognition of the changes wrought by modern technology was one of the primary motivations for the 1972 amendments to the LHWCA. *Caputo*, 432 U.S. at 269. This is reflected in the structure of the expanded coverage provisions, which abandoned the historic "water's edge" approach, *see Nacirema Operating Co., Inc. v. Johnson*, 396 U.S. 212 (1969), in favor of the two-pronged "status" and "situs" test. Under the amendments a claimant must be an employee engaged in maritime employment ("status"), 33 U.S.C. § 902(3), and the injury must occur on the navigable waters of the United States as expansively defined in the Act ("situs"). 33 U.S.C. § 903(a).

The legislative purpose of the 1972 amendments was not merely that coverage be expanded, but also that it should be uniform. *Caputo*, 432 U.S. at 276. One of the drawbacks of the approach adopted by the Fourth Circuit is its propensity to have employees move in and out of coverage in the course of their employment. In this case, no one questions that Humphries met the status requirement. Even though the immediate task he was embarked upon when the accident occurred seems more gastronomic than maritime, the fact is that he was carrying out a regular duty imposed by his longshore employer—a job directly related to the loading of a vessel and calculated to save the employer considerable costs in overtime pay. The sole basis for Humphries' disqualification by both the BRB and the Court of Appeals was that his injury was held to have occurred away from the marine terminal. Had Humphries received the identical injury at the commencement of his trip, *before* he exited the Cargill facility and turned into Bainbridge Boulevard, or at the conclusion of his trip, *after* he pulled off the public highway onto the Cargill facility, he would have been covered. On the same assignment, Humphries was literally driving in and

out of LHWCA coverage. This is directly contrary to the intent of Congress in the 1972 amendments. As noted by the First Circuit, as quoted by this Court, "the evil of the old Act was that it bifurcated coverage for essentially the same employment." *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 275 (1st Cir. 1976), quoted in *Caputo*, 432 U.S. at 276.

When dealing with locations customarily used by employers for longshoring operations, any attempt to define "adjoining area" in the sense of "contiguous" must necessarily defeat the Congressional purpose. Rather, a functional test of the situs requirement must be developed—and it should be devised by this Court.

In the past the Court has repeatedly recognized its obligation to effectuate the legislative intent of the 1972 amendments by defining and explicating their "status" requirement. *See Herb's Welding Inc. v. Gray*, 470 U.S. 414 (1985); *P.C. Pfeiffer Company, Inc. v. Ford*, 433 U.S. 904 (1977), 444 U.S. 69 (1979); *Caputo*, 432 U.S. 249 (1977). The "situs" requirement is no less important to the Congressional design and no less deserving of attention. Both are important factors in a major piece of national legislation, the last word on which should be spoken by the nation's highest Court.

2. This Court Should Grant Certiorari to Resolve a Multi-Circuit Conflict as to the Situs Requirement of the LHWCA.

The circuit courts are in broad disagreement over the situs requirement of the LHWCA. 33 U.S.C. § 903(a). No less than four different approaches have been taken in various jurisdictions.

The Third Circuit holds that an employee engaged in maritime activity may be covered by the LHWCA even if the accident occurs at a remote location separated from the pier by public streets. "The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing." *Sea-Land Service, Inc. v. Director, Office of*

Workers' Compensation Programs, 540 F.2d 629, 638 (3d Cir. 1976). *See also Dravo Corporation v. Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

The Fifth Circuit holds that the situs under Section 3(a) of the LHWCA may be an adjoining area if it is "close to or in the vicinity of navigable waters, or in a neighboring area." *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514 (5th Cir. 1980). In *Winchester* a gear room located five blocks from the waterfront was held not to be undeniably outside of the waterfront area customarily used by employers for repairing tools used by stevedores. *Id.* at 514. The court also rejected the theory that the presence or absence of non-maritime buildings between the location of the accident and the waterfront should be an absolute test in determining whether an injury is covered by the LHWCA. *Id.*

The Ninth Circuit has enunciated four relevant factors for determining whether a site is an adjoining area in accordance with Section 3(a) of the LHWCA: (1) suitability of the site for maritime uses; (2) whether adjoining properties are devoted primarily for maritime use; (3) proximity of the site to waterway; and (4) whether the site is as close to the waterway as is possible. Applying this test in *Motoviloff v. Director, Office of Workers' Compensation Programs*, 692 F.2d 87 (9th Cir. 1982), the court held that a facility for refurbishing metal containers was not a "situs" in accordance with the LHWCA, since refurbishing did not require a maritime site and the location of the site was dependent on cost and transportation factors rather than its waterfront proximity. However, the same court has held that an accident involving a longshoreman, who while driving his automobile home was injured 1,700 feet landward of the access gate, occurred in an "adjoining area" within the meaning of the LHWCA. *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 1101 (9th Cir. 1982).

While the First Circuit has not articulated a test to determine whether a work area meets the "situs" requirement, it has favored a liberal application of the statute. In *Stockman* the First Circuit found Congress intended "adjoining areas" to include

not only those areas directly adjoining an unloading vessel, but also areas that are part of the same waterfront. 539 F.2d at 275.

The Fourth Circuit seems to be at odds with itself. In *Newport News Shipbuilding and Dry Dock Company v. Graham*, 573 F.2d 167 (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1979), it held that a submarine shop and foundry were within the navigable waters of the United States, since these locations were integral components of the shipyard even if they were located thousands of feet from the water's edge and did not perform ship-related work exclusively. When the Fourth Circuit in this case affirmed the judgment of the BRB which had denied Humphries compensation pursuant to the LHWCA, it came into conflict with its own past decision.

The ambiguity created as a result of the varying tests for determining if the "situs" requirement of the LHWCA has been met and the courts' differing interpretations call for review by this Court. As matters now stand, longshoremen covered by a uniform master collective bargaining agreement and performing identical services for the same ship as it makes its way along the coast are or are not entitled to compensation under the LHWCA depending solely on the fortuitous circumstance of which port they happen to be injured in. The anomalies wrought by the disagreement among the circuits are particularly odius here, where they vitiate the express Congressional design to avoid inconsistent coverage of the LHWCA and incongruous results. *See Caputo*, 432 U.S. at 268, 273, 276.

A decision by the Supreme Court would resolve the split among the circuits and effectuate the will of Congress with respect to uniform coverage of the Act.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 26, 1988

Respectfully submitted,

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No. 87-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLIFTON J. HUMPHRIES,
Petitioner,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petitioner's injury occurred upon an area adjoining the navigable waters of the United States, and customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel, as required by 33 U.S.C. § 903(a).

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Cargill, Incorporated, and Commercial Union Insurance Company respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 834 F.2d 372.

STATEMENT OF THE CASE

Humphries worked for Cargill as a ship foreman at its plant in Chesapeake, Virginia. On December 23, 1974, he sustained injuries in an automobile accident on

Bainbridge Boulevard, approximately 1.5 miles from Cargill. Humphries had driven to a local restaurant to pick up a meal for another foreman, and while checking under the hood of his car, parked in front of the restaurant, was injured when another vehicle struck his car from the rear. Cargill's Chesapeake, Virginia plant occupies a site on the Southern Branch of the Elizabeth River, and includes a pier where ships are loaded with grain. Humphries' accident occurred on Bainbridge Boulevard, in front of a restaurant, between Middle and Hill Streets, about 1.5 miles from Cargill, and several hundreds yards from the river. Bainbridge Boulevard runs north-south, roughly parallel to, and about one-half mile east of, the Southern Branch of the Elizabeth River. Many small businesses are located on both sides of Bainbridge Boulevard, which is intersected by numerous residential streets. Several businesses, some maritime in nature, are situated on the banks of the Elizabeth River. A residential neighborhood lies between the restaurant and the river (App. C-14).

Cargill's workers compensation carrier, Commercial Union, paid Humphries benefits under the Virginia Workers Compensation Act. In April 1984, Humphries filed a claim under the Longshore and Harbor Workers Compensation Act (LHWCA). On January 17, 1986, following a hearing, an administrative law judge of the U.S. Department of Labor issued a decision awarding Humphries compensation under the LHWCA. On December 15, 1986, the Benefits Review Board reversed the ALJ's decision, holding that Humphries' accident did not occur upon a "maritime situs" within the meaning of 33 U.S.C. § 903(a), and that the claim, therefore, did not fall within the coverage of the LHWCA. The U.S. Court of Appeals for the Fourth Circuit, in an opinion issued August 28, 1987, affirmed the BRB, agreeing that the situs requirement of 33 U.S.C. § 903(a) had not been met.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below does not conflict with decisions of this Court.

The Supreme Court has recognized that Congress, in the 1972 amendments to the LHWCA, established a two-part test for coverage under the Act:

> Having established that respondents . . . satisfied the "status" test for coverage under the Act, we consider now whether their injuries occurred on a covered "situs" . . . .

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 279 (1977).

The *Caputo* decision dealt primarily with status, and only briefly with situs. The Court held that the pier on which respondent Blundo was injured while checking cargo being removed from a container, was a covered situs (the situs requirement having been conceded as to respondent Caputo):

> Accordingly, we conclude that when Congress sought to expand the situs to avoid anomalies inherent in a system that drew lines at the water's edge, it intended to include an area such as the one at issue here.

Id. at 281.

More recently, again in a decision turning upon the "status" issue, this Court has reaffirmed the requirement of a two-part test for coverage under the LHWCA. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). In a five-four decision, the Court reversed the Court of Appeals for the Fifth Circuit, holding that a welder on a fixed offshore oil-drilling platform was not engaged in "maritime employment" within the meaning of 33 U.S.C. § 902(3). Writing for the majority, Justice White observed:

> Respondents, and the dissenters, object that denying coverage to someone in Gray's position will result in exactly the sort of inconsistent, checkered coverage that Congress sought to eliminate in 1972. In the words of the court below, it creates a "curious hole" in coverage, 703 F.2d at 178, because Gray would have been covered had he been injured on navigable waters or on the outer shelf.
>
> We do not find the argument compelling . . . *there will always be a boundary to coverage, and there will always be people who cross it during their employment.*
>
> * * * *
>
> As we have said before in this area, if Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them.

Id. at 426-427 (emphasis added).

The Petitioner has failed to explain how the Court of Appeals decision conflicts with the decisions of this Court. The Supreme Court, *Caputo*, and *Herb's Welding*, *supra*, has held that the status and situs test must both be satisfied, to establish coverage under the LHWCA. In *Caputo*, the Court specifically found that a pier, used for loading and unloading containers, was a covered situs, because it was a part of a terminal adjoining navigable waters. The Fourth Circuit held that Humphries was not injured on a covered situs, because a restaurant on a public highway, located approximately one and one-half miles from Cargill, did not constitute an "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel," within the meaning of 33 U.S.C. § 903(a). Clearly, the Court of Appeals has not decided this issue in conflict with the decisions of this Court.

2. There is no conflict among the circuit courts, such as to require the Supreme Court's intervention.

Several circuit courts have addressed the situs coverage issue, since the enactment of the 1972 amendments to the LHWCA. The First Circuit has held that an employee injured while stripping a container on a pier approximately 700 feet to 800 feet across the water from the pier at which the container had been unloaded, satisfied the situs requirement. *Stockman v. John T. Clarke & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir. 1976). The court was not called upon to define or delineate the boundaries of an "other adjoining area" within the meaning of Section 3(a), but based its decision upon a determination that the employee was injured at a terminal customarily used in loading and unloading vessels, observing, "we are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters." *Id.* at 272.

Citing *Caputo, supra*, the Fourth Circuit has ruled that a claimant under the LHWCA must satisfy both the situs and status requirements. *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 169 (4th Cir. 1978). The court found that a submarine shop and a foundry were "integral parts of the shipyard even though they are located 1,200 feet and 3,000 feet respectively from the water's edge,"[2] reasoning that these facilities were located in an area adjoining navigable waters and customarily used in repairing and building vessels. *Id.* In the decision below, the court did not attempt to formulate a comprehensive situs test, instead basing its conclusion primarily upon the fact that the location of the restaurant at which Humphries was injured appeared largely "fortuitous" and was not an "integral part" of Cargill's terminal. 834 F.2d at 375.

The Fifth and Ninth Circuits have developed more detailed analyses to determine whether a location is an

"other adjoining area" within the meaning of the situs statute. Both courts emphasize an area's functional relationship to maritime activity. The Fifth Circuit has held that neither fences and similar boundaries, nor the presence of non-maritime buildings between the point of injury and the water, are conclusive, but that the use to which the site is put is the chief factor:

> The answer to the question of where the boundaries are to an "area" is found right in the statute. *The perimeter of an area is defined by function.* The "area" must be one "customarily used by an employer in loading, unloading, repairing, or building a vessel." The statute does not require that the area's exclusive use be for maritime purposes so long as it is customarily used for significant maritime activity.

Texports Stevedore Co. v. Winchester, 632 F.2d 504, 515 (5th Cir. 1980) (emphasis added).

The Ninth Circuit, like the other courts which have addressed the situs issue, has not attempted to devise a conclusive test. Rather, the court reasoned that "the phrase 'adjoining area' should be read to describe a *functional relationship* that does not in all cases depend upon physical contiguity," and identified four factors helpful in determining whether a site is an "adjoining area":

> The particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 141 (9th Cir. 1978) (emphasis added).

In *Winchester* and *Herron*, *supra*, the courts articulated similar guidelines and, applying those tests to sim-

ilar facts, reached identical conclusions (that a gear room, located several hundred yards from the water was a covered situs, because it was situated as close as feasible to the water, and was an integral part of the loading and unloading process).

The Petitioner cites *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982), as an example of confusion and inconsistency within a circuit. The Petitioner, however, misconstrues the court's holding in *Perkins*. The Employer had not asserted the coverage defense, and the administrative law judge did not address the issue. On appeal, the Benefits Review Board raised the situs issue, holding that it went to the question of subject matter jurisdiction. The Ninth Circuit reversed and remanded, ruling that the Benefits Review Board was without authority to raise the issue *sua sponte*, because situs pertains to coverage, not subject matter jurisdiction. The court held that the employer had waived the right to contest coverage on situs grounds, concluding:

> Given Perkins' undisputed status as a maritime employee *and the closeness of the situs issue (which we need not resolve here)*, the case clearly presented a sufficient nexus with traditional maritime activities to vest the Board with subject matter jurisdiction to address the issues raised by Marine on appeal.

Id. at 1102 (emphasis added).

The Third Circuit has sounded the only discordant note among the circuits with respect to the situs issue, holding, in effect, that the situs requirement should be disregarded. *Sea-Land Service, Inc. v. Director, Office of Workers Compensation Programs*, 540 F.2d 629 (3rd Cir. 1976). The court remanded the case because it felt the evidence adduced at the hearing pertained to situs, which the court believed was largely irrelevant:

> As long as the employment nexus (status) with maritime activity is maintained, the federal compensa-

> tion remedy should be available. *Resuscitating the situs requirement in cases satisfying the status test will interfere with Congress' intention to eliminate the phenomenon of shifting coverage.* It is the situs of vessels in maritime commerce, not the situs of their maritime employees at the time of the injury, that in our view Congress referred to by its reference to navigable waters.

Id. at 638 (emphasis added).

No other circuit has adopted this approach. The Supreme Court has implicitly rejected this interpretation of the situs/status test:

> The 1972 Amendments thus changed what had been essentially only a "situs" test of eligibility for compensation to one looking to both the "situs" of the injury and the "status" of the injured. We must now determine whether respondents Caputo and Blundo satisfied these requirements.

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 264-265 (1977); *see Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985).

3. It is not the Supreme Court's function to review facts and re-weigh the evidence.

The situs determination under the LHWCA turns upon a careful weighing of facts, and is not particularly well-suited to the application of formulas and tests. Where the lower court decision turns solely upon an analysis of the particular facts involved, this Court will usually deny certiorari. *U.S. v. Johnston*, 268 U.S. 220, 227 (1925).

Where a court of appeals has reviewed administrative agency findings, the Supreme Court will only rarely intervene, where the substantial evidence standard of review "appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310

(1974). The Petitioner argues that the decision below was "based on patent mistakes of fact in evidence" (Petition, p. 33). The Benefits Review Board and the court of appeals have reviewed the administrative law judge's findings of fact. It is not this Court's duty to do so again.

4. The court below correctly decided the situs issue in this case.

In affirming the decision of the Benefits Review Board, the Fourth Circuit followed its own precedent, and the guidelines established by the other circuits, expressly rejecting, however, the Third Circuit's approach, expressed in *Sea-Land Service*, *supra*. The court acknowledged that there is no single, comprehensive situs test, and based its decision upon four factors.

While agreeing that an injury need not occur within a specified distance of navigable waters, to satisfy the situs requirement, the court nonetheless found relevant the fact that Humphries' accident happened more than one mile from Cargill's terminal. 834 F.2d 372-373, 375. At the time of his injury, Humphries was not traveling between two portions of Cargill's terminal, and his route did not traverse a continuous or contiguous terminal area. *Id.* at 375. The court concluded that the restaurant to which Humphries had traveled, separated from the river by a residential area, was not an "integral part" of Cargill's terminal, and agreed with the Benefits Review Board, that the location of the restaurant was "fortuitous," not dictated by proximity to the waterfront. *Id.*

The Petitioner's emphasis on the legislative intent underlying the 1972 amendments, is misplaced. As this Court discussed in *Caputo* and *Herb's Welding*, *supra*, Congress, in expanding the geographic reach of the LHWCA, was responding to a changed maritime environment, in which containerization and other developments

had moved inland many of the traditional stevedoring functions which had formerly been conducted at the water's edge. Unlike *Winchester* and *Herron*, *supra* (both cases holding that a gear room located outside the terminal gates, was nonetheless a covered situs), this case does not raise questions emanating from changes in marine technology or the landward expansion of traditional maritime facilities.

Humphries was injured on a public highway in front of a restaurant, between one and one and one-half miles from Cargill's terminal. Had the restaurant been located even farther away from the river and the Cargill terminal, one would assume the Petitioner would still argue that Humphries "carried situs" wherever he went, as long as he was engaged in his employer's business. As the court below concluded, "were we to read the situs requirement so broadly as to embrace this claim, however, we would come perilously close to eliminating it entirely." 834 F.2d at 375.

The only way to elminate uncertainty and "walking in and out of coverage," would be to discard the situs requirement itself. No single test will guarantee uniformity of results, an end which can not be achieved unless the statute itself is changed. That is the province of Congress, not the courts.

CONCLUSION

The Court of Appeals' decision neither conflicts with Supreme Court precedent, nor with the decisions from the other circuits, with the exception of the Third Circuit, whose decision in *Sea-Land Service, Inc. v. Director, OWCP*, *supra*, has been discredited by this Court. The situs determination turns almost entirely upon an analysis of the particular facts of the case, which have been reviewed by the Benefits Review Board and the court of

appeals. A further review of the facts is neither necessary nor appropriate. The petition should be denied.

Respectfully submitted,

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Washington, D.C. 20210

QUESTION PRESENTED

Whether a maritime employee who was injured in an automobile accident that took place in front of a restaurant, located in the waterfront area, to which he had been sent in the course of his employment, was injured on a "situs" covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 903(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1287

CLIFTON J. HUMPHRIES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B16) is reported at 834 F.2d 372. The opinion of the Benefits Review Board (Pet. App. C1-C17) is reported at 19 Ben. Rev. Bd. Serv. (MB) 187. The decision of the administrative law judge (Pet. App. D1-D38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1987. A petition for rehearing was denied on October 30, 1987 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on January 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed as a ship foreman by respondent Cargill, Inc. at its grain loading facility on the Elizabeth River in Chesapeake, Virginia. On December 23, 1974, petitioner was working at Cargill's terminal, supervising loading operations on the second shift, which runs from 3:30 p.m. to midnight. Petitioner's duties included picking up food for employees working overtime, so that there would be no interruption in their work. Pet. App. B3. Petitioner left the Cargill terminal in his car at approximately 10 p.m. to pick up a meal at a restaurant about one and one-half miles away, on Bainbridge Boulevard, a major road in the waterfront area of Chesapeake (*id.* at B3-B4). The restaurant was located "along a public highway on which various maritime employers maintained terminal facilities. The restaurant itself was several hundred yards from the Elizabeth River." *Id.* at B13. Petitioner parked in front of the restaurant. After emerging, he encountered trouble with his car. Petitioner got out to look under the hood and, while he was doing so, another automobile struck petitioner's car. Petitioner suffered severe spinal cord and head injuries, leaving him permanently and totally disabled. *Id.* at B4.

2. Petitioner filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* (Pet. App. B4).[1] An in-

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[1] The LHWCA was amended in 1984 by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, and retitled the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* Individuals like petitioner, who sustained injuries before September 29, 1984, are covered by the LHWCA as it stood before the 1984 amendments. See § 28(c), 98 Stat 1655. Accordingly, we refer throughout

dividual is eligible for benefits under the LHWCA if he satisfies two requirements: the "status" test and the "situs" test. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256-265 (1977). Under the status test, LHWCA coverage applies (with certain specific exceptions) to any "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker" (33 U.S.C. 902(3)). The situs test requires that the injury occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)" (33 U.S.C. 903(a)).

When petitioner filed for LHWCA benefits, his employer, Cargill, and its insurance carrier, respondent Commercial Union Insurance Company, contested the claim. After a hearing, an administrative law judge (ALJ) of the Department of Labor found that petitioner satisfied both the status and situs tests (Pet. App. D8-D17).[2] The

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this brief to the LHWCA as it stood before the 1984 amendments. Although the 1984 amendments changed both of the provisions involved in this case (see §§ 2, 3, 98 Stat. 1639-1641), those changes are not relevant to the issues in this case.

[2] Petitioner was injured on December 23, 1974 and did not file for LHWCA benefits until April 6, 1984 (see Pet. App. D6-D7). The LHWCA provides that claims must be filed within one year of the injury (33 U.S.C. 913(a)). It also provides, however, that if the employer has knowledge of the injury it must file a report with the Secretary of Labor, and that the period within which the employee must file his claim is tolled until the employer files its report (33 U.S.C. 930(f)). The ALJ found that Cargill, although it learned of petitioner's injury the day it occurred, did not file a report with the Secretary until September 24, 1984 (Pet. App. D8). Accordingly, the ALJ concluded that petitioner's claim was timely (*ibid.*).

ALJ held that petitioner met the status test because his duties as shift foreman involved supervising the loading and unloading of cargo on vessels moored at his employer's facility (Pet. App. D9), and petitioner had gone to the restaurant pursuant to those duties (*id.* at D10-D11, citing *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978) (maritime status depends on general employment duties, not the particular task employee was performing when injured)).[3]

The ALJ also held that petitioner was injured on a maritime situs (Pet. App. D11-D12). In reaching this conclusion, the ALJ relied principally on the nature of the area in which the restaurant was located. He noted that the injury occurred three-tenths to four-tenths of a mile from the river (*id.* at D15) in an "industrial area associated with maritime activities and the waterfront" (*id.* at D14 (citation omitted)).

The Benefits Review Board reversed the ALJ's award (Pet. App. C1-C17). The Board found that petitioner was not injured on a maritime situs. It explained that "[a]t the time of his injury, [petitioner] was not exposed to the hazards uniquely inherent in the shipyard industry. Instead, [petitioner] was injured on a public street in front of a restaurant in an area where maritime industry co-exists with other non-maritime activities including businesses and residential neighborhoods." *Id.* at C15-C16. The Board was unwilling to treat as a maritime situs an area which was "not primarily used for or particularly suited to maritime commerce" (*id.* at C16).

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[3] This status determination was not seriously contested by Cargill at any stage of the litigation and is not at issue in this Court (see Pet. App. B7-B8).

3. The court of appeals affirmed the Board's decision.[4] It agreed that petitioner satisfied the status test (Pet. App. B7-B8) and found that the "difficult question" was whether petitioner "was injured in an 'adjoining area customarily used by an employer in loading . . . a vessel' " (*id.* at B8, quoting 33 U.S.C. 903(a)). The court of appeals explained that although "[i]t is generally settled that a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation * * * [there is] no single convincing test for determining just where the geographical boundaries of coverage under the LHWCA lie" (*id.* at B8-B9 (citation omitted)).

After canvassing the precedents[5] and summarizing the ALJ's factual findings, the court of appeals, "[w]ithout venturing to offer a touchstone for all future LHWCA

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[4] The federal respondent, although a party to the appeal, did not file a brief in the court of appeals.

[5] The court of appeals drew on the two cases that have discussed the situs requirement in the most detail, *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981), and *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978), and also briefly discussed a prior decision of its own, *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978). It specifically rejected (Pet. App. B9-B10) petitioner's suggested reliance on *Sea-Land Service, Inc.* v. *Director, OWCP*, 540 F.2d 629, 636-639 (3d Cir. 1976), which held that the situs requirement is satisfied whenever the status requirement is satisfied. The court of appeals found the Third Circuit's approach to be inconsistent with this Court's cases, which it interpreted as holding that "*both* the status and situs requirements of the Act must be met independently" (Pet. App. B10, citing *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 426-427 (1985); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977) (emphasis in original)).

jurisdictional questions [concluded] that these findings by the ALJ do not demonstrate that [petitioner] was injured on a maritime situs" (Pet. App. B14). The court explained that the accident occurred "well over a mile from the Cargill terminal, along a public highway which did not connect any portions of Cargill's operations or traverse continuous or contiguous terminal areas," and that the "restaurant itself, while arguably located in a 'waterfront area,' was separated from the Elizabeth River and the nearest maritime terminal by a residential neighborhood" (*ibid.*). On that basis, the court found that the Benefits Review Board was correct in holding that petitioner was not injured on a maritime situs (*id.* at B15).

ARGUMENT

The court of appeals correctly concluded that the determination of maritime situs under Section 903(a) requires a case-by-case analysis of varying fact patterns. While it is debatable whether the court of appeals reached the correct conclusion on the basis of the facts in this case, its result is plausible and does not conflict with any decision of this Court or any other court of appeals. Although it might at some point be useful for this Court to consider the "other adjoining area" element of the situs requirement, the issue has received relatively little treatment in the courts of appeals and the peculiar facts of this case militate against the consideration of that question in this context. Accordingly, further review is not warranted.

1. The court of appeals held that petitioner was not injured within an "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" (see 33 U.S.C. 903(a)). The court of appeals stated that "[t]he LHWCA requires us to draw a spacial line for coverage under the Act" (Pet. App. B15), and

found that the restaurant was in a mixed-use area on the non-maritime side of that line, relying on its distance from the river and the Cargill terminal as well as its separation from the river by a residential neighborhood.[6]

According to the court of appeals, Section 903(a) requires case-by-case line drawing, because there is "no single convincing test for determining just where the geographical boundaries of coverage under the LHWCA lie" (Pet. App. B9). That approach was correct. The statutory definition does not prescribe in any detail how to determine the borders of "other adjoining area[s]," and petitioner does not suggest any particular formula for doing so.[7] On the facts as it understood them, the court of appeals concluded that the mixed-use locale in which the restaurant was located was beyond the maritime situs. While the court's weighing of the relevant factual considerations can reasonably be disputed, neither its reasoning nor its conclusion justifies further review.

This Court has considered the situs test only once, in *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249

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[6] Petitioner maintains (Pet. 33) that the court of appeals' account of the facts was incorrect, and in particular that the residential neighborhood in question was landward of the restaurant, not between it and the river. Even if that is correct, a factual error by the court of appeals would not be grounds for review by this Court.

[7] The court of appeals appears to have held that the restaurant was on the landward side of the line dividing maritime from non-maritime areas (see Pet. App. B13 (ALJ properly considered "the character of the area in which the accident occurred")). For that reason, the court of appeals did not have to consider whether the situs test requires that the specific place at which the injury occurs, as opposed to the broader area within which that place is located, needs to be "customarily used by an employer" for maritime purposes (see 33 U.S.C. 903(a)). See *Texports Stevedore Co.* v. *Winchester,* 632 F.2d at 516 (rejecting suggestion that situs test turns on "the precise place where the injury occurred rather than the broader area").

(1977). *Caputo* dealt, not with the statutory category at issue in this case—"other adjoining area"—but with an injury that took place in a terminal, one of the sites specifically listed in Section 903(a). It held that the entire terminal was a maritime situs, although only one of its two piers was actually used for loading and unloading vessels (432 U.S. at 280-281). The approach and outcome in this case are entirely consistent with *Caputo*.[8]

2. a. The decision in this case does not conflict with that of any other court of appeals. Petitioner suggests (Pet. 18-20) that the decision below is inconsistent with *Sea-Land Service, Inc.* v. *Director, OWCP*, 540 F.2d 629 (3d Cir. 1976). In *Sea-Land*, the Third Circuit in effect eliminated the situs test as an independent requirement, holding that if a worker meets the status test his location at the time of the injury is irrelevant (see 540 F.2d at 636-639). As the court of appeals in this case recognized (Pet. App. B9-B10), however, that approach did not survive this Court's decision in *Caputo*, which expressly held that an individual is covered only if he meets both the situs and status tests (see 432 U.S. at 264-265).

The two court of appeals opinions that have discussed the "other adjoining area" component of the situs requirement in some detail are both consistent with the approach taken below. In *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504 (1980) (en banc), cert. denied, 452 U.S. 905 (1981), the Fifth Circuit considered the application of the situs test to a "gear room," located five blocks from the gates of the dock, that was used to maintain and repair stevedoring equipment (632 F.2d at 506-507). The Fifth Circuit held that the gear room was within an "other adjoining area" covered by the Act, noting that there was

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[8] Contrary to petitioner's suggestion (Pet. 17), *Caputo* did not deemphasize the situs requirement. It simply held that in that case the situs requirement was easily met.

no need for absolute contiguity of maritime structures between a covered area and the water (*id.* at 514). The court of appeals in that case declined to set forth a general rule, finding instead that "[t]he best way to effectuate the congressional purposes is to determine the situs question by looking at all the circumstances" (*id.* at 513).

The Ninth Circuit has also addressed this issue, in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (1978) (Kennedy, J.). The injury in *Brady-Hamilton* occurred in a gear locker, used to store and repair stevedoring equipment, that was located outside of the port proper, 2,600 feet from the river's edge (568 F.2d at 139). Like *Texports*, *Brady-Hamilton* found that an area need not be contiguous with the water in order to be a maritime situs (*id.* at 140-141). Instead, the Ninth Circuit, admitting that the test is not precise (*id.* at 140), found that "the phrase 'adjoining area' should be read to describe a functional relationship that does not in all cases depend upon physical contiguity" (*id.* at 141). The court then suggested the following factors, among others: "the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case" (*ibid.*).[9]

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[9] The First Circuit has also applied the "other adjoining area" aspect of the situs test, although without venturing to discuss it in much detail, in *Prolerized New England Co.* v. *Benefits Review Board*, 637 F.2d 30, 38-39 (1980), cert. denied, 452 U.S. 938 (1981). Relying on the construction of "terminal" adopted by this Court in *Caputo*, the First Circuit held that an "injury in an adjoining area used for both loading and manufacturing met the situs requirement" (637 F.2d at 39).

Thus, the opinions in this case, *Texports,* and *Brady-Hamilton* all recognize that determining whether a site is within an "other adjoining area" involves a fact-specific inquiry that considers geography and maritime function but does not rest on any one factor. All the courts have rejected a requirement of absolute contiguity with the water, but none has adopted a firm test. Although the Ninth Circuit listed certain considerations that may be relevant, it understood that others might also have some bearing on the decision (*Brady-Hamilton*, 568 F.2d at 141). No court of appeals has adopted a rule that would require a different outcome in this case.[10]

b. The lower courts have generally found that the "other adjoining area" aspect of the situs test involves, not a difficult legal question, but the difficult application of an inherently uncertain legal standard to varying fact patterns (see, *e.g.*, Pet. App. B7 (statute creates "intractable jurisdictional problems")). Thus, if this Court ever decides that it would be useful to address the issue, it would benefit greatly from additional decisions in the lower courts, so that the application of the test could be understood in a variety of contexts. Of course, the Court may find that the statutory standard admits of no significant clarification. Cf. *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 426 (1985) ("there will always be a boundary to coverage, and there will always be people who cross it during their employment" (citation omitted)).

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[10] Petitioner also discusses (Pet. 23-24) *Perkins* v. *Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982) and *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977). In *Perkins*, the situs issue was not contested before the ALJ and the court of appeals did not reach it on the merits. *Stockman* involved, not an "other adjoining area," but a terminal.

Moreover, this case is not well suited to be a vehicle for consideration of this question. For one thing, the facts appear to be in dispute (see Pet. 33 (alleging errors by court of appeals)), and they are not developed in great detail in the court of appeals' opinion. It would be difficult, then, to develop a fact-sensitive standard of the sort clearly required by Section 903(a). In addition, in this case the actual site of the injury – the restaurant – was only indirectly connected to the shipping industry (compare *Texports*, 632 F.2d at 516 (suggesting that stevedore company's own office building was a covered situs although not used for loading or unloading)). While the court of appeals did not rely on this fact, it introduces a consideration that does not appear to be typical of cases involving "other adjoining area[s]." For that reason, a decision in this case might be of relatively little general applicability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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